TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 67

SOUTHPORT PETROLEUM COMPANY,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 1, 1941.

CERTIORARI GRANTED JUNE 2, 1941.

SUPREME COURT OF THE UNITED STATES

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[fols. 1-61]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of Southport Petroleum Company and Oil Workers International Union, Local No. 227

Cases Nos. C-477 and R-600.—Decided August 4, 1938

Oil Refining Industry—Interference, Restraint, and Coercion: expressed opposition to labor organization; discrediting union leadership; refusal to meet with outside representatives for purposes of collective bargaining—Discrimination: discharges: for union activity; charges of, not sustained as to one employee—Collective Bargaining: charges of refusal to bargain collectively, not sustained—Reinstatement Ordered—Back Pay: awarded—Investigation of Representatives: controversy concerning representation of employees—Unit Appropriate for Collective Bargaining: production and maintenance employees, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees; petition for separate unit for employees engaged in boilermaking trades: denied, interests of employees so engaged indistinguishable from interests of other production and maintenance employees—Election Ordered.

Mr. Warren Woods, for the Board.

Mr. F. W. Fischer, of Tyler, Tex., and Mr. Harry Dow, of Houston, Tex., for the respondent.

Mandell & Combs, by Mr. Arthur J. Mandell, of Houston, Tex., for the Oil Workers.

Mr. J. N. Davis, of Kansas City, Kan., for the Brotherhood.

Mr. Warren L. Scharfman, of counsel to the Board.

[fol. 62]

Decision

Order and Direction of Election

STATEMENT OF THE CASE

Upon charges and amended charges duly filed by Oil Workers International Union, Local No. 227, herein called the Oil Workers, the National Labor Relations Board,

herein called the Board, by Edwin A. Elliott, Regional Director for the Sixteenth Region (Fort Worth, Texas), issued its complaint dated December 1, 1937, against Southport Petroleum Company,[1] Texas City, Texas, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

On August 17, 1937, the Oil Workers also filed with the Regional Director for the Sixteenth Region a petition alleging that a question affecting commerce had arisen concerning the representation of employees of the respondent and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the Act. On November 20, 1937, the Board, acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hear- [fol. 63] ing upon due notice. At the same time the Board issued an order pursuant to Article II, Section 10 (c) (2) and Article II, Section 37 (b) of said Rules and Regulations consolidating the cases for purposes of hearing.

With respect to the unfair labor practices, the complaint alleged in substance that the respondent, on or after June 11, 1937, refused to bargain collectively with the Oil Workers, which represented a majority of the respondent's employees in an appropriate unit; that the respondent discharged four named employees between August 4 and October 15, 1937, because of their affiliation with and support of the Oil Workers; and that by these acts the respondent had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. The complaint and accompanying notice of hearing was duly served upon the respondent and the Oil Workers.

The respondent's answer denied that it was engaged in that commerce which was within the contemplation of the

[1] Erroneously referred to in the complaint before it was amended as Southport Refinery Company.

Act, and also denied the other material allegations of the complaint.

Pursuant to the notice, a hearing on both the petition and the complaint was held at Houston, Texas, from December 13 through December 17, 1937, and on January 13, 1938, before Joseph F. Kiernan, the Trial Examiner duly designated by the Board. At the hearing the International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America, herein called the Brotherhood, moved to intervene in the representation case.[2] This motion was granted. The Board, the respondent, and the Oil Workers were represented by Counsel and the Brotherhood by the assistant vice president, and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence [fol. 64] bearing on the issues was afforded all parties. During the course of the hearing the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On March 7, 1938, the Trial Examiner filed his Intermediate Report, and on March 18, 1938, a supplement thereto, in which he found that the respondent had discharged three of the four employees named in the complaint because they joined and assisted the Oil Workers. He recommended that they be reinstated with back pay. The Trial Examiner also found that the fourth employee named in the complaint was not discharged for union activity, and that the respondent had not refused to bargain collectively with representatives of its employees in an appropriate unit. On March 24, 1938, the respondent filed exceptions to the Intermediate Report.

On July 28, 1938, pursuant to permission granted by the Board, the respondent presented oral argument before the Board in support of its exceptions to the Intermediate Report. The Board has considered the exceptions to the Intermediate Report, but save for those which are consistent with the findings, conclusions, and order set forth below, finds them to be without merit.

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[2] Case No. R-600.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Southport Petroleum Company, a Texas corporation organized in 1932, is engaged in the business of refining crude oil and distributing gasoline, fuel oil, and gas oil. The main office and one of the respondent's refineries is located at Kilgore, Texas. The respondent also operates [fol. 65] a refinery at Texas City, Texas, a terminal and docks at Avondale, Louisiana, some oil wells located in Texas, and some pipe lines which are used to gather oil for its refineries.

The refinery operated by the respondent at Texas City, with which we are here concerned, has a capacity of 20,000 barrels of crude oil a day. The average daily consumption is approximately 9,000 to 10,000 barrels. The respondent has a 150-acre tank farm at this refinery which has a storage capacity of 500,000 barrels. Ordinarily 300,000 to 400,000 barrels of crude oil are stored there. The refining of crude oil at Texas City is a continuous process and requires both day and night shifts of workers.

Approximately 75 per cent or more of the crude oil used by the respondent at Texas City is shipped to it in tankers coming through the Gulf of Mexico from Corpus Christi, Texas. This oil originates in the oil fields adjacent to Corpus Christi. Another portion of the crude oil at the Texas City refinery, at times running as high as 30 per cent of the total, comes from Louisiana in the barges of the Southport Transit Company, a corporation controlled by the officers and stockholders of the respondent. The respondent also purchases a small amount of refined oil which is brought from Louisiana to Texas City, where it is canned and resold.

About 33 per cent of the total production at Texas City consists of gasoline. The remaining 66 per cent is made up of fuel oils and gas oils. The respondent sells these products through local salesmen operating in Houston, Texas, and through brokers in New York City and elsewhere. During the year 1936 the gross receipts from sales from the Texas City refinery amounted to approximately $9,000,000. About 10 per cent of the product is shipped

to Avondale, Louisiana, in barges owned by the Southport Transit Company, and sold there by the respondent. Approximately 30 per cent of the product is sold to purchasers [fol. 66] who take delivery in trucks at Texas City. The remaining 60 per cent of the product is loaded in tankers at Texas City, the great bulk thereof being destined for states other than Texas or for foreign countries. About 50 per cent of the tankers carrying the respondent's products purchase bunker oil from the respondent which they use for their own propulsion.

The respondent has a trademark covering one of its brands of gasoline, which is registered with the United States Patent Office for use in commerce between the several States.

II. The Organizations Involved

Oil Workers' International Union, Local No. 227, is a labor organization affiliated with the Committee for Industrial Organization, admitting to its membership all production and maintenance employees regularly employed by the respondent at its refinery at Texas City, Texas, exclusive of office workers and supervisory employees.

International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America is a labor organization. It is affiliated with the American Federation of Labor and with its Building Trades, Metal Trades, and Railway Employees departments, and with the Chief Executives Association of the 21 Standard Railroad Unions. The local lodge at Houston, Texas, admits to membership boilermakers, welders, riveters, caulkers, burners, layers-out, flangers, erecters, helpers, apprentices, etc.

III. The Unfair Labor Practices

A. The refusal to bargain collectively

1. The appropriate unit

The Oil Workers urged as an appropriate unit all of the production and maintenance employees regularly employed by the respondent at its Texas City, Texas, refinery, [fol. 67] exclusive of office workers and supervisory employees. The Brotherhood contends that the employees in the classifications of the boilermaking trade working for the respondent constitute an appropriate unit—that is,

boilermakers, welders, caulkers, their helpers, and apprentices. The respondent maintained that the appropriate unit should consist of all of its employees at Texas City except the manager, superintendent, and assistant superintendent.

In accordance with our usual practice, where no labor organization desires to represent the office workers, salesmen, chemists, and supervisory employees, we shall exclude them from the appropriate bargaining unit because of the dissimilarity between their interests and those of the production employees.

Neither the Oil Workers nor the Brotherhood admits to its membership the special watchman or the truck drivers who are hired with their own trucks by the respondent. The Oil Workers exclude the special watchmen from membership because they are temporary employees hired for special purposes. The Oil Workers exclude truck drivers who are hired with their own trucks from membership because they are looked upon as independent contractors. We find that there is a diversity in the interests of the regular production and maintenance employees and the interests of the special watchmen and the truck drivers who are hired with their own trucks. We shall exclude the two latter classes from the appropriate unit.

The Brotherhood contended that the boilermakers, welders, caulkers, their helpers, and the apprentices to these crafts, constitute an appropriate unit. It based its contention on the Board's decision in Matter of Gulf Oil Corporation and International Brotherhood of Boilermakers, Iron Shipbuilders, Welders & Helpers of America.[3] In that case, in determining that the unit advocated by the Brotherhood was an appropriate one, we said,

[fol. 68] Wherever possible, it is obviously desirable that, in the determination of the appropriate unit, we render collective bargaining of the Company's employees an immediate possibility. In the instant proceeding the record clearly indicates that a majority of the boilermaking employees at the Port Arthur refinery have authorized the Boilermakers to act as their bargaining agent and that that labor organization has for the past four or five years been recognized by the Company as the representative of its

[3] 4 N. L. R. B. 133.

members. On the other hand, there is no evidence that the majority of the other employees at the refinery belong to any union whatsoever; nor has any labor organization petitioned the Board for certification as representative of the refinery employees on a plant-wide basis. Consequently, even if the boilermaking employees do not constitute the most effective bargaining unit, as the Oil Workers contend, nevertheless, in the existing circumstances, unless they are recognized as a separate unit, there will be no collective bargaining agent whatsoever for these workers, who for years have actually engaged in collective bargaining with the Company.

The reasons motivating our determination of an appropriate unit consisting of the boilermaking and welding department in the Gulf Oil case, as urged by the Brotherhood, are not present here. While there is evidence in the record indicating that the boilermakers, welders, caulkers, and their helpers, employed by the respondent at Texas City, desire to be represented by the Brotherhood, the Brotherhood has never bargained with the respondent for them, as was true in the Gulf Oil case. In fact the Brotherhood has never approached the respondent for any purpose up to the time of the hearing. Moreover, in the present case there is evidence that a majority of the employees at the refinery desire to be represented by the Oil Workers, and the Oil Workers have, since June, 1937, attempted to deal with the respondent, and have petitioned the Board for certification as representative of the employees on a plant-wide basis. It is [fol. 69] apparent that the rejection of the unit contended for by the Brotherhood will not act as a deterrent to collective bargaining, as would have been true in the Gulf Oil case.

Specifically, the Brotherhood's claim is that there are 18 persons employed by the respondent at the boilermaking trade, and that persons so employed constitute an appropriate unit. In support of its claim to represent the employees in such unit the Brotherhood introduced a petition signed by 17 of the 18 persons alleged to be working at the boilermaking trade. The pay-roll records of the respondent list 10 of the 17 employees who signed the Brotherhood's petition as laborers, and there is no showing that the employees which the Brotherhood claims are engaged in the boilermaking trades are actually working at boilermaking

or any other operation identified with the boilermaking trade. The Brotherhood has in effect requested that certain individuals be designated as an appropriate bargaining unit. These individuals, however, are not so engaged in the boilermaking trade as to give them an identity of interests clearly distinguishable from the interests of the other employees, which we generally associate with and find in a craft unit. The Brotherhood has not requested a unit which can be termed appropriate for the purposes of collective bargaining. We will therefore include the employees signing the Brotherhood's petition within the larger unit.

We find that the production and maintenance employees regularly employed by the respondent at Texas City, Texas, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

[fol. 79] 2. Representation by the Oil Workers of the Majority in the Appropriate Unit

The respondent employed between 220 and 230 persons in the appropriate unit during the period from July 1 to December 1, 1937, and 223 persons during the payroll period ending November 30, 1937. On June 4, 1937, the Oil Workers informed the respondent that it represented a majority of the employees in such unit and at all times thereafter continued to assert this claim.

The secretary of the Oil Workers brought to the hearing 144 membership cards in the Oil Workers, which were signed, he testified, by employees of the respondent. The Oil Workers refused to introduce the cards in evidence and thereby divulge the names of its members to the respondent. As a result it is impossible to ascertain when the cards were signed, or whether or not the signatures are genuine. Nor is it possible to determine whether or not the employees signing them are within the unit which we have found to be appropriate. Moreover, 34 employees advised La Ferney, the manager of the Texas City refinery, during the months preceding the hearing that they no longer desired to be rep-

resented by the Oil Workers, and that they had discontinued their membership in the Oil Workers.

On the record before us, we cannot find that on June 4, 1937, or at any time thereafter the Oil Workers represented a majority of the persons employed by the respondent in the unit which we have found to be appropriate for purposes of collective bargaining. We find that the respondent has not refused to bargain collectively with the representative of its employees in an appropriate unit.

We will order that the complaint be dismissed in so far as it alleges that the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

[fol. 71] B. The Discriminatory Discharges

The complaint alleged that the respondent discharged William Cornish, Earl Gooch, Edward A. Patricio, and E. D. Richey because they joined and assisted the Oil Workers. The respondent's answer admitted the discharges, but alleged that they were made for incompetency, insubordination, and because of a lack of work.

The alleged discriminatory discharges must be viewed in the light of certain circumstances which reflect the attitude of the respondent toward the organization of its employees. In the spring of 1937, just after the respondent had given its employees an increase in wages, Lee La Ferney, the manager of the Texas City refinery, addressed all of the employees at a meeting at noon, and told them, among other things, that there were outside interests at work in the plant and that the employees should be careful as they only wanted the employees' money. This occurred at a time when the Oil Workers had organized a substantial number of the respondent's employees. In June La Ferney expressed his position to William Cornish more clearly. According to Cornish's testimony, La Ferney said that he was not against labor organization, "but if we knew what he knows about the executives of the organization we were in, we would get out guns and go after them." La Ferney went on to explain that he would like to see a union of the men in the plant, without any outside executives. La Ferney maintained this position when the Oil Workers attempted to negotiate with the respondent during the succeeding months. These statements were calculated to have an

added effect upon the men because, as La Ferney pointed out in his spring speech, he had once been organizer for the International Association of Oil Field, Gas Well, and Refinery Workers, the predecessor to the Oil Workers.

On October 8, 1937, Earl Gooch, who had been discharged from the Texas City refinery in August, talked to M. M. Travis, the secretary of the respondent, at Kilgore, Texas. [fol. 72] Travis told Gooch, "Don't let outside activities interfere with your work and your efficiency, because Mr. Lewis will look after himself, and it is up to you to look after yourself."

Early in the fall G. Tate, the chief chemist, handed Foy Hopkins, one of his subordinates and a member of the Oil Workers, a copy of an Oil Workers' publication entitled Things * * * Every Oil Worker Should Know. Tate had crossed out the word "Things" in the title, and had written underneath the remainder of the title, "Enough to take care of his job and let the other fellow do likewise."

Keeping in mind the attitude of the respondent toward the Oil Workers, as expressed by the actions of some of its supervisory employees noted above, we turn to a consideration of the circumstances surrounding the discharge of each of the employees involved.

E. D. Richey. E. D. Richey was employed by the respondent as a boiler repairman from December 1935 until he was discharged on October 15, 1937. During the course of his employment he received three raises in pay, the last one, fixing his pay at 85 cents an hour, about 4 or 5 months before his discharge. No complaints were ever registered against his work, and it was always passed by the State Boiler Inspector.

Richey joined the Oil Workers in June 1937. He was active on its behalf, and frequently wore his button at the plant. On September 20, 1937, he was elected steward of the Oil Workers. Prior to his discharge he was a member of the Organizing Committee of the Oil Workers.

V. Q. Davis, Richey's brother-in-law and foreman, discharged him on October 15, for coming on the job intoxicated. Davis explained that Richey came to the refinery intoxicated on a Wednesday night and failed to do his work. Thursday Davis secured authority from Hinds, the superintendent, to discharge Richey. However, Davis did not [fol. 73] discharge Richey on Thursday, and his work was satisfactory. Davis testified that Friday night Richey was

intoxicated again and failed to perform his duties, and that on Saturday he discharged him. Richey admitted that Davis had spoken to him at home and told him that if he did not stop running around to the saloons he would be discharged, but testified that he never drank on the job and never came to work intoxicated. J. C. Greathouse, who worked alongside of Richey on certain shifts, testified that he had never seen Richey drinking at the refinery and had never seen him drunk during working hours. H. B. Hilliard, another employee, testified that he saw and talked to Richey the last night that he was employed, and that Richey was working that Friday night and was not intoxicated.

After his discharge Richey spoke to both Hinds and Davis, each of whom indicated that the other had been responsible for his discharge. Upon request Davis gave Richey a recommendation on the respondent's letterhead which read as follows:

Oct. 18, 1937.

To whom it may concern:

Mr. E. D. Richey was employed at our plant as a boiler maker since December 26, 1935. His work was satisfactory. We or I, the undersigned, unhesitately recommend him for such work.

V. Q. Davis, Forman Engineer.

We find from all of the evidence that Richey was not intoxicated while working for the respondent on the three nights prior to his discharge. We also find that he was discharged because he joined and assisted the Oil Workers, and that by such discharge the respondent had discriminated in regard to his hire and tenure of employment, and has thereby discouraged membership in the Oil Workers. We further find that by such action the respondent has interfered with, restrained, and coerced its employees [fol. 74] in the exercise of the rights guaranteed under Section 7 of the Act.

Prior to his discharge Richey earned 85 cents an hour, and worked 8 hours a day, 5 days a week. He earned $3.36 from the time of his discharge up to the time of the hearing. He desires to be reinstated.

William Cornish. William Cornish was hired by the respondent at the Texas City refinery as an electrician on June 24, 1935, and remained in that capacity until he was

discharged on August 4, 1937. Even after his discharge J. C. Hinds, the superintendent, characterized him as a good electrician.

Cornish joined the Oil Workers about June 1936. As a member of the Organizing Committee he was one of its most active members. In March 1937 he was made a member of the Workmen's Committee which was formed to bargain with the respondent for the Oil Workers. In this capacity Cornish had several conferences with La Ferney. In July Cornish was elected vice president of the Oil Workers. Less than a month later he was discharged.

Superintendent Hinds stated that he discharged Cornish "for continually leaving the job without informing anyone where he was going or why." Cornish was paid a monthly salary, and worked 5 days a week. He was free to choose the day of the week he was to take off. Hinds testified that Cornish was required to notify him what day he would not report for work. Cornish testified that he had been told to notify his fellow workers rather than Hinds, and that he always told Meadows, his helper. Meadows testified that he had always received such notification from Cornish. Hinds and Smith, the assistant superintendent, testified, however, that on several occasions they had warned Cornish about going off the job without informing his superiors. Cornish denied having received such warnings. In any event no disciplinary action was ever taken.

[fol. 75] During the month of July Cornish was having an extensive amount of dental work done. On Friday, July 30, he had an appointment to visit his dentist. On Thursday, July 29, the dentist called the refinery and left word with La Ferney that he could not see Cornish on Friday, but that he would see him on Tuesday, August 3. La Ferney delivered the message to Cornish. Cornish worked on Friday, but went to the dentist on Tuesday. On Monday Cornish told Meadows he would not report to work on Tuesday. The dentist did not finish with Cornish on Tuesday, and Cornish went back to see him on Wednesday. As a result he came to work between 9:30 and 10 o'clock on Wednesday morning although he should have been there at 7 o'clock. Cornish telephoned Meadows on Wednesday morning and reported that he would be in late. Shortly after he came to work Hinds discharged him.

A. R. Quinn replaced Cornish. Quinn had applied to La Ferney for a job on Monday, August 2, at which time La

Ferney told him there was going to be a change and that he would keep him in mind. On August 4, after Cornish had been discharged, La Ferney called Quinn, who started to work for the respondent on August 5.

We find that William Cornish was discharged because of his activity on behalf of the Oil Workers, and that by such discharge the respondent has discriminated in regard to his hire and tenure of employment, and has thereby discouraged membership in the Oil Workers. We also find that by such action the respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed under Section 7 of the Act.

Prior to his discharge Cornish earned $185 a month, working 8 hours a day, 6 days a week. After his discharge, Cornish was unable to get a job until September 7, when he was hired as a Frigidaire serviceman. Cornish earned $369 on that job up to December 1. He desires reinstatement.

[fol. 76] Earl Gooch. Earl Gooch was employed by the respondent for 4½ years, at the Texas City refinery for the past 2½ years. Prior to the termination of his employment on August 4 he was working as a welder. Gooch received several wage increases while working for the respondent, the last increase, which came about a month before his discharge, fixing his pay at 90 cents an hour. No complaints were ever made about his work.

Gooch joined the Oil Workers in February 1937. About May 1 he was elected acting secretary and as member of the Organizing Committee was one of the most active members of the Oil Workers.

On August 4, the same day that William Cornish was discharged, Hinds told Gooch he was being permanently transferred to the respondent's refinery at Kilgore. Gooch obtained an advance for travel expenses and proceeded to Kilgore, where he was put to work for an independent contractor named Ulmer, who was doing some construction work for the respondent at the Kilgore refinery. Early in October when Gooch's work with Ulmer was completed he talked with M. M. Travis, the secretary of the respondent in regard to further work. Travis, after indicating to Gooch that union activity was impairing his efficiency, told him that the respondent had no more work for him

at Texas City, and that he had only been called to Kilgore because there was work available for him with Ulmer. Gooch, although ostensibly transferred to the respondent's Kilgore refinery on August 4, was, in fact discharged on August 4.

Just before Gooch was sent to Kilgore, the respondent transferred another welder, Grady Suttles, from Kilgore to Texas City. Gooch was discharged because, with Suttles working at Texas City, there was not enough work for him to do. Travis, the secretary of the respondent, was the only witness to testify as to the reasons for the transfer of Suttles, and he admitted that his knowledge was obtained from other officers of the respondent after the transfer. He first stated that Suttles was transferred to Texas City [fol. 77] because he was desirous of making the change due to illness in his family. Subsequently, he indicated that the respondent transferred Suttles because Gooch was not capable of working on pressure units and because Suttles was senior in service to Gooch. The recognition by the respondent of the difference in capabilities of the two men was expressed by the payment of $1.05 per hour to Suttles and 90 cents per hour to Gooch. However, Gooch had welded both flat work and pressure units for the respondent, and when Travis called the Texas City refinery for "expert welders" to work for Ulmer at Kilgore, Hinds sent him Gooch. Moreover, after his discharge Gooch obtained a temporary job as welder with the Sinclair Refining Company. A. Mochel, the welding foreman at the Sinclair Refining Company, testified that to get the job Gooch took a competitive examination, and was 1 of 5 out of 15 who were hired. He also testified that Gooch's work was satisfactory even on pressure units. Sinclair Refining Company paid Gooch $1.15 an hour. While the respondent has differentiated in the hourly rates of Suttles and Gooch it has not differentiated in the type of welding that they were assigned to do, and Gooch was in fact able to weld pressure units. Although the respondent's classification of Gooch and its opinion of his capabilities are entitled to great weight, the evidence impels us to the conclusion that the respondent's actions cannot be ascribed to the reasons it here offers. We cannot accept the respondent's contention that Suttles' transfer which resulted in Gooch's discharge was made because Gooch was not a good welder capable of welding pressure units.

The respondent also contends that Suttles was properly allowed to replace Gooch because he was senior in service to him. In this connection it should be noted that Suttles' seniority was determined on an employer basis; that there was no evidence to show that the respondent had customarily adopted an employer seniority rule in its two refineries which were over 200 miles apart; and that Gooch was senior in service at the Texas City refinery. In any event there is no affirmative showing that the respondent was [fol. 78] aware of or considered the fact that Suttles was senior to Gooch on an employer basis at the time the transfer was made. We are constrained to reject the respondent's contention that Suttles' transfer to Texas City and the resultant displacement of Gooch was proper because of Suttles' seniority.

On August 4, at the time Gooch was discharged because Suttles' presence in Texas City created an excess of welders, Jack Wilson, another welder, was retained in the respondent's employ at Texas City. Gooch was senior in service to Wilson, Wilson, like Suttles, received $1.05 an hour, but his work was similar to that performed by Gooch. If the respondent properly followed seniority in allowing Suttles to transfer to Texas City, thus necessitating the dismissal of a Texas City welder, then it obviously discriminated against Gooch thereafter by dismissing him while retaining Wilson, who was junior in service to him, in its employ.

We find that Earl Gooch was discharged because he joined and assisted the Oil Workers, and that by such discharge the respondent has discriminated in regard to his hire and tenure of employment, and has thereby discouraged membership in the Oil Workers. We also find that by such action the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed under Section 7 of the Act.

Prior to his discharge Gooch earned 90 cents an hour, working 40 hours a week. From August 5 to October 8 he earned $369 working for the Ulmer Pipe Line Co. Thereafter, he also earned $141.20 working for the Sinclair Refining Company prior to the hearing. He desires to be reinstated.

E. A. Patricio. Patricio was employed by the respondent for 18 months prior to his discharge on August 13,

1937. He worked as a truck loader 4 days a week and as a manifest clerk 1 day a week. The record shows that his work was satisfactory.

[fol. 79] Patricio was a member of the Oil Workers and wore his button at the plant occasionally. He talked to some of the other employees about joining the Oil Workers, but was not an officer of the Oil Workers or a member of any of its committees.

Patricio was discharged after having been accused of writing derogatory remarks about La Ferney on the walls of the lavatory. Before discharging Patricio the respondent attempted to prove that he had been responsible for the writing in question. After the investigation La Ferney said to Patricio, "I am not quite convinced it is your writing, but I have heard you have said things about me, and that you were not satisfied out here, so therefore I am going to have to let you go."

The Trial Examiner found that Patricio was not discharged because of his membership in and activity on behalf of the Oil Workers. The Oil Workers did not except to the finding of the Trial Examiner.

Upon the evidence before us we find that Patricio was not discharged because of his membership in the Oil Workers. We will order that the complaint be dismissed with respect to him.

IV. The Effect of the Unfair Labor Practices on Commerce

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

We shall order the respondent to make the discharged employees whole for any loss of pay they have suffered by [fol. 80] reason of their respective discharges by payment to each of them of a sum equal to the amount which he normally would have earned as wages from the date of his

discharge to the date of the offer of reinstatement, less his net earnings [4] during said period.

VI. The Question Concerning Representation

On June 4, 1937, the Oil Workers wrote to the respondent stating that it represented a majority of the respondent's employees and asking that a date be set for collective bargaining. Similar requests were made by the Oil Workers on a number of different occasions during the succeeding months. The respondent refused to meet and negotiate with the Oil Workers because it claimed that it was not subject to the Act, and that the Oil Workers did not represent a majority of its employees.

We find that a question has arisen concerning representation of employees of the respondent.

VII. The Effect of the Question Concerning Representation on Commerce

We find that the question concerning representation which has arisen, occurring in connection with the operations of the respondent described in Section I above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VIII. The Determination of Representatives

In Section III-A-2 above, we examined the evidence introduced by the Oil Workers to show that it represented [fol. 81] a majority of the employees in the unit which we have found to be appropriate in Section III-A-1, above, and concluded that it was insufficient to establish the fact that the Oil Workers represented a majority of the em-

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[4] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but fo his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers, Local No. 2590, 8 N. L. R. B., No. 51.

ployees in such unit. We find that the question concerning representation which has arisen can best be resolved by means of an election by secret ballot.

As the petition requesting an investigation and certification of representatives was filed almost a year ago, we will not follow our usual practice of limiting eligibility to vote to persons in the employ of the respondent at the time such petition was filed, but will provide that those persons employed by the respondent in the appropriate unit during the pay-roll period next preceding the date of the issuance of this Decision and Direction of Election, and those ordered reinstated by this Decision, shall be eligible to vote, excluding those who have since quit or been discharged for cause.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. Oil Workers International Union, Local No. 227, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. The respondent, by discriminating in regard to the hire and tenure of employment of William Cornish, E. D. Richey, and Earl Gooch, and thereby discouraging membership in Oil Workers International Union, Local No. 227, has engaged in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. The respondent, by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

[fol. 82] 4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

5. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (5) of the Act.

6. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act, with respect to the discharge of E. A. Patricio.

7. A question affecting commerce has arisen concerning the representation of employees of Southport Petroleum Company, Texas City, Texas, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

8. The regular production and maintenance employees of the respondent, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Southport Petroleum Company, Texas City, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

[fol. 83] (b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

(b) Make whole William Cornish, E. D. Richey, and Earl Gooch for any loss of pay they have suffered by reason of

their discharge by payment to each of them, respectively, of a sum of money equal to that which he would normally have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less the net earnings of each, respectively, during said period;

(c) Post immediately notices in conspicuous places at its Texas City, Texas, refinery stating that the respondent will cease and desist in the manner aforesaid, and maintain said notices for a period of thirty (30) consecutive days from the date of posting;

(d) Notify the Regional Director for the Sixteenth Region within ten (10) days from the date of this order what steps the respondent has taken to comply herewith.

And it is further ordered that the complaint be, and it hereby is, dismissed in so far as it alleges that the respondent has engaged in unfair labor practices within the meaning of Section 8 (5) of the Act, and in so far as the allegations of the complaint relate to E. A. Patricio.

[fols. 84-88] DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended, it is hereby

Directed that, as part of the investigation authorized by the Board to ascertain representatives for collective bargaining with Southport Petroleum Company, Texas City, Texas, an election by secret ballot shall be conducted within fifteen (15) days from the date of this Direction, under the direction and supervision of the Regional Director for the Sixteenth Region, acting in the matter as agent for the National Labor Relations Board, and subject to Article III, Section 9, of said Rules and Regulations, among the regular production and maintenance employees who were employed by Southport Petroleum Company as its Texas City, Texas, refinery, at any time during the pay-roll period next preceding the date of the issuance of this Direction of Election, excluding special watchmen, truck drivers who drive their own trucks, office workers, salesmen, chemists, and

supervisory employees, and those employees who quit the employ of the respondent or were discharged for cause between such date and the date of election, but including those employees whose reinstatement was ordered by the above Order, to determine whether or not they desire to be represented by Oil Workers International Union, Local No. 227, for purposes of collective bargaining.

[fol. 89] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. C-477

In the Matter of

SOUTHPORT PETROLEUM COMPANY

AND

OIL WORKERS INTERNATIONAL UNION, LOCAL NO. 227

National Labor Relations Board. Jul. 25, 1939. Docket J.

STIPULATION

The National Labor Relations Board, hereinafter called the Board, on August 4, 1938, having issued its Decision and Order in the above-entitled matter, requiring the Southport Petroleum Company, hereinafter called the Company, to cease and desist from certain practices and to take certain affirmative action, and it being the desire of the parties hereto to enter into an adjustment of the matters

It is hereby stipulated and agreed by and between the parties hereto that:

1. The Company, its officers, agents, successors and assigns agree to cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organi-[fol. 90] zation of its employees, by discharging its employees, or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-

organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. The Company, its officers, agents, successors and assigns, agree to offer to William Cornish, E. D. Richey and Earl Gooch within ten (10) days of the date of the approval of this Stipulation by the Board immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, said reinstatement to take place within thirty (30) days of the date of the approval of this Stipulation by the Board, it being understood that William Cornish, E. D. Richey and Earl Gooch shall signify their acceptance of the offer of reinstatement within fifteen (15) days of receipt of same and that they shall be allowed the full thirty (30) days in which to prepare to come to work if desired by them.

3. The Company, its officers, agents, successors and assigns, agree to post immediately notices in conspicuous places at its Texas City, Texas, refinery, containing the following language and maintain said notices for a period of thirty (30) consecutive days from the date of posting:

Southport Petroleum Company, its officers, agents, successors and assigns, will cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organiza-
[fol. 91] tion of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

4. Compliance with the terms of this Stipulation shall by all parties hereto be considered as compliance with the terms of said Decision and Order of the Board dated August 4, 1938.

5. The Company, its officers, agents, successors and assigns agree not to seek to review and set aside said Decision and Order of the Board dated August 4, 1938.

6. The Board, provided the terms of this Stipulation are complied with by the Company, will not seek to enforce said Decision and Order of August 4, 1938; in the event the Company does not comply with the terms of this Stipulation the Board may disregard the terms of this Stipulation and take such action deemed advisable including enforcement of its Decision and Order through the Court.

7. It is understood and agreed that this Stipulation is subject to the approval of the Board and shall become effective immediately upon the granting of such approval.

Signed this 27 day of June, 1939.

F. W. Fischer, Attorney for the Southport Petroleum Company.

[fols. 92-95] Signed this 21st day of June, 1939.

Winthrop A. Johns, Attorney, National Labor Relations Board.

UNITED STATES OF AMERICA,
National Labor Relations Board:

I, Nathan Witt, Secretary of the National Labor Relations Board, and official custodian of its records, do hereby certify that attached is a full, true, and complete copy of: the Board Minute of July 21, 1939 in the Southport Refinery Company case:

Southport Refinery Company, Texas City, Texas, C-477: The Board approved the settlement.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the National Labor Relations Board to be affixed this 24th day of April, A. D. 1940, at Washington, D. C.

Nathan Witt, Secretary. (Seal.)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

APPLICATION OF RESPONDENT FOR LEAVE TO ADDUCE ADDITIONAL MATERIAL EVIDENCE—Filed August 21, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, NOVEMBER TERM, 1939

No. 9517

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

SOUTHPORT PETROLEUM COMPANY, Respondent

Application to the Court for Leave to Adduce Additional Material Evidence

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The Southport Petroleum Company, a corporation duly organized under the laws of the State of Texas, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, U. S. C. Supp. IV, Title 29, Sec. 151 et seq.), respectfully applies to this Court for leave to adduce additional evidence, which is material to this cause, and which evidence could not be given at the hearing before the Board in the proceeding before the Board entitled "In the Matter of Southport Petroleum Company and Oil Workers' International Union, Local #227, Case #C-477 and R-600", and in support of this application, this respondent respectfully shows:

(1)

That this respondent is a Texas corporation and was engaged in business in the State of Texas within this Judicial Circuit, during the hearing conducted by an Examiner of the Board in connection with the above cause, and so conducted its business in the State of Texas until on or about June 30, 1939, when this respondent liquidated and discontinued all operations.

(2)

That on or about June 30, 1939, this respondent liquidated all of the assets of the corporation by declaring a liquidat-

ing dividend to its stockholders, said liquidating dividend consisting of all of the assets of the corporation. That said assets consisted of a refinery in Kilgore, in East Texas, and oil properties in East Texas, and a refinery in Texas City, in South Texas; that said liquidating dividend was distributed among the four (4) stockholders; namely, Cornelius Kroll, who owned 1500 shares of the capital stock; G. G. Kroll, who owned 1500 shares of the capital stock; M. M. Travis, who owned 1500 shares of the capital stock, and E. M. Travis, who owned 1500 shares of the capital stock of the Southport Petroleum Company, a Texas corporation. That the said M. M. Travis and E. M. Travis received the Kilgore refinery and the East Texas oil holdings of the Southport Petroleum Company, and the said Cornelius Kroll and G. G. Kroll received the Texas City refinery and the properties in South Texas.

(3)

That in pursuance to the requirement of Section 148 (d) of the Revenue Act of 1938, the Southport Petroleum Company, within thirty (30) days after said liquidation, filed in Washington, D. C., a return of information on Form #966, and same was mailed by registered mail on July 26, 1939, to the Commissioner of Internal Revenue in Washington, D. C.

(4)

That the said Cornelius Kroll and G. G. Kroll transferred and conveyed the refinery at Texas City to a corporation known as the Southport Petroleum Company of Delaware, a Delaware corporation; that the owners of the stock of Southport Petroleum Company of Delaware, were never the owners of any of the stock of the respondent herein, and the Southport Petroleum Company of Delaware is a new corporation which did not exist at the time of the hearing before the Board, and the Southport Petroleum Company of Delaware is the present operator of the refinery at Texas City.

(5)

That the Southport Petroleum Company, a Texas corporation, the respondent herein, no longer operates any refinery and is not in any active business, and, therefore, it would not be practical for the Court to enter any order against said liquidated corporation known as the Southport Petroleum Company, a Texas corporation and respondent herein,

because said corporation owns no assets and has not engaged in any business since its liquidation on or about June 30, 1939.

(6)

That there were reasonable grounds for failure to adduce such evidence in the hearing before the Board, its member, agent or agency, because the liquidation of the Southport Petroleum Company, a Texas corporation, respondent herein, by the declaration of a liquidating dividend of all of its assets, occurred on or about June 30, 1939, or after the hearing conducted by the Examiner representing the National Labor Relations Board, and after the Board filed its Order on August 4, 1938, and, therefore, this respondent could not have adduced such evidence before the Board issued its Order of August 4, 1938.

That in view of these developments, this respondent prays that the Court issue its order that such additional material evidence be taken before the Board, its member, agent or agency, and that same be made a part of this Transcript, as provided under Title 29, Section 160 (e), Volume 29, 30, U. S. C. A., page 73 (cumulative pocket parts), and upon said facts being made part of the record, this Honorable Court dismiss this proceeding, because the respondent cannot reinstate any employees and cannot carry out any other orders of the Board, for it is not engaged in conducting any business.

Harry Dow, Attorney for Respondent.

THE STATE OF TEXAS,
County of Harris:

Cornelius Kroll, being first duly sworn, states that he is president of the Southport Petroleum Co., a Texas corporation, and is authorized to and does make this verification in behalf of said corporation:

That he has read the foregoing application and motion and that the statements made therein are true to the best of his knowledge, information, and belief.

Cornelius Kroll.

Subscribed and sworn to before me this 15th day of August, 1940. Mary Schaub, Notary Public in and for Harris County, Texas. (Seal.)

OPPOSITION MEMO TO APPLICATION FOR LEAVE TO ADDUCE ADDITIONAL MATERIAL EVIDENCE—Filed September 28, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, OCTOBER TERM, 1939

No. 9517

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

SOUTHPORT PETROLEUM COMPANY, Respondent

On Petition for the Enforcement of an Order of the National Labor Relations Board

MEMORANDUM IN OPPOSITION TO APPLICATION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

This memorandum is submitted by the National Labor Relations Board, petitioner in the above-entitled matter, in opposition to the application filed by Southport Petroleum Company, respondent, for leave to adduce additional evidence before the Board pursuant to Section 10 (e) of the National Labor Relations Act (49 Stat. 449, U. S. C. Supp. V, Title 29, Sec. 151 et seq.). The Board herein respectfully prays that the motion be denied or, in the alternative, that this Honorable Court withhold decision upon respondent's application until hearing of the merits of the case.

Statement

On August 4, 1938, the Board, upon full proceedings had before it, issued its decision in the case, reported at 8 N. L. R. B. 794, setting forth its findings of fact, conclusions of law and order. In brief, the Board found that respondent had violated Section 8 (1) and (3) of the Act by discharging three named employees because of their union membership and activity. The Board ordered respondent to cease and desist from its unfair labor practices, to reinstate with back pay the employees discriminated against, and to post appropriate notices. On June 27, 1939, respondent entered into an agreement of settlement, subject to approval by the Board, in which it was provided that respondent would cease and desist from the unfair labor practices found, offer

reinstatement to the three employees discriminatorily discharged, and post specified notices. It was further agreed that the parties would not seek review or enforcement of the Board's order provided respondent would comply in full with the terms of the stipulation, but that in the event respondent failed to comply therewith, the Board would be free to take appropriate steps for enforcement of its order in full. The stipulation was approved by the Board and became effective on July 21, 1939; respondent was so notified. Respondent, however, did not comply with the terms of the stipulation, and, on April 17, 1940, the Board served notice upon respondent that it would proceed by appropriate action for full enforcement of its order. On April 26, 1940, the Board, pursuant to Section 10 (e) of the National Labor Relations Act, filed with this Court its petition for the enforcement of its order as aforesaid.

Respondent has not filed or served any answer to the petition for enforcement. Instead, respondent, on August 15, 1940, filed, and on August 23, 1940, served upon the Board, an application for leave to adduce additional evidence. The evidence which respondent seeks to adduce, in brief, is as follows: That on or about June 30, 1939, respondent declared a liquidating dividend of all its assets, consisting of two oil refineries and various oil properties in Texas, among the four persons who were the owners and holders of its corporate stock; that the refinery and properties in Texas City, Texas, at which the unfair labor practices found by the Board occurred, were distributed to two of its stockholders, who thereafter transferred and conveyed the refinery to a new corporation not in existence at the time of the issuance of the Board's order and the stockholders of which were never the owners of any of the stock of respondent; that the new corporation is the present operator of the refinery at Texas City; and that respondent no longer operates any refineries and is not in any active business.

On the basis of these representations, respondent claims that "it would not be practicable for the Court to enter any order against said liquidated corporation and respondent herein, because said corporation owns no assets and has not engaged in any business since its liquidation on or about June 30, 1939." We show herein (1) that the additional evidence sought to be adduced is not material and hence does not meet an essential requirement of Section 10 (e)

which limits the conditions under which the Court may permit additional evidence to be adduced; and (2) that if the Court should have any doubt in the matter, it should withhold its decision on respondent's application until hearing on the merits.

1. The application should be denied since the additional evidence sought to be adduced is not material as required by the Act. Section 10 (e) of the Act provides that—

> * * * If either party shall apply to the court for leave to adduce additional evidence *and shall show to the satisfaction of the court that such additional evidence is material* and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board * * *, the court may order such additional evidence to be taken before the Board * * *. [Italics supplied.]

The sole issues before this Court upon the petition for enforcement are whether the Board's findings that respondent has violated Section 8 (1) and (3) of the Act are supported by substantial evidence and whether the Board's order is valid and proper under the Act. In sum, the question at this time is only whether the order was "lawful when made." National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 272. The evidence sought to be adduced plainly is not material to that question. Assuming, arguendo, the facts to be as respondent has represented in its application, they are not addressed to the merits of the case, but are merely in the nature of a plea in avoidance going to the present ability of respondent to comply with the terms of the order. But that is not a question now before the Court. That is solely a question of compliance to be determined after the order has been reviewed and it is determined that the Board is entitled to enforcement. The applicable authorities so hold. Thus in National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 272, the Supreme Court squarely held that

> * * * an order of the character made by the Board, *lawful when made, does not become moot because* * * * *changing circumstances indicate that the need for it may be less than when made.* [Italics supplied.]

See also Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 230; National Labor Relations Board v. Pure Oil Co., 103 F. (2d) 497 (C. C. A. 5). And in National Labor Relations Board v. Carlisle Lumber Co., 99 F. (2d) 533, 541 (C. C. A. 9), cert. den. 306 U. S. 646, the Court stated:

> If occurrences subsequent to the order of the Board were material it would be impossible to determine the propriety of reinstatement and back wage orders upon the record made at the Board's hearing—the record upon which this Court has a duty to determine the validity of the order and the respondent's duty to comply therewith. In the interval between issuance of the Board's order and the determination of the matter by the Court, the employees discriminated against might find work elsewhere. Since this could be neither affirmed nor negatived by the record upon which the Board must reach a decision, the Board could never know whether reinstatement with back wages was an appropriate remedy in a particular case, nor could the Court judge the propriety of the order upon the record made before the Board.[1]

The provision of Section 10 (e) for a procedure for the presentation and consideration of evidence after the order of the Board has been issued is entirely consistent with this principle. That section specifically requires that the evidence which it is desired to adduce must be "material." The decisions cited above hold that evidence of events subsequent to the entry of the order of the Board cannot meet this qualification since such occurrences are irrelevant to the validity of the order. Section 10 (e) was designed to allow only the introduction of evidence improperly excluded by the Board (Consolidated Edison case, 305 U. S. at 225-226), or of newly discovered evidence. The condi-

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[1] See also National Labor Relations Board 1. Gerling Furniture Mfg. Co., 103 F. (2d) 683 (C. C. A. 7); National Labor Relations Board v. Oregon Worsted Co., 94 F. (2d) 671, 96 F. (2d) 193 (C. C. A. 9); National Labor Relations Board v. Biles-Coleman Lumber Co., 96 F. (2d) 197 (C. C. A. 9); National Labor Relations Board v. American Potash & Chemical Corp., 98 F. (2d) 488 (C. C. A. 9), certiorari denied, 306 U. S. 643; National Labor Relations Board v. Stackpole Carbon Co., 105 F. (2d) 167 (C. C. A. 3).

tions specified in the section as prerequisite to the consideration of additional evidence are, in substance, a restatement of the rules determining the admissibility of newly discovered evidence in courts of law. See Cyclopedia of Federal Procedure, Vol. 5, Sec. 1481.

Moreover, contrary to respondent's claim, it is clear upon the face of the application that the events alleged to have occurred subsequent to the issuance of the Board's order are not such that disable it from compliance, at least in large measure, with the terms of the order. Orders of the Board made in discharge of the congressional mandate to prevent unfair labor practices (Section 10 (a)) are necessarily prospective in operation. Far from alleging any dissolution, respondent has moved to adduce the additional evidence in its corporate name. The corporation in fact is still in existence. The cease and desist provisions of the order, mandatory under Section 10 (c) of the Act, may, therefore, properly be enforced in order to enjoin respondent from again engaging in the unfair labor practices found should it resume active business operations, if in fact respondent has ceased active operations. So, too, respondent ought to be required upon resumption of operations, if it can not now do so, to offer reinstatement to the employees it unlawfully discharged. In any event, respondent should immediately be required to make whole the employees for any losses of pay incurred by them because of respondent's illegal discrimination. That obligation, of a continuing public character, may not be defeated by respondent's liquidation. Agwilines, Inc. v. National Labor Relations Board, 87 F. (2d) 146, 150 (C. C. A. 5); National Labor Relations Board v. Hearst, 102 F. (2d) 658, 664-666 (C. C. A. 9); Mooresville Cotton Mills v. National Labor Relations Board, 94 F. (2d) 61, 66 (C. C. A. 4); National Labor Relations Board v. Hopwood Retinning Co., 98 F. (2d) 97, on contempt 104 F. (2d) 302 (C. C. A. 2); Cf. National Licorice Co. v. National Labor Relations Board, 309 U. S. 350. The question of the exact extent to which respondent can in fact comply with the order is, as we have already shown, not here material. Enough has been indicated, however, to show that respondent in any event is not, as it claims, totally disabled from compliance.

2. Unless denied, we respectfully submit that the Court should postpone decision on respondent's application until

hearing of the case on the record before it. Other Circuit Courts of Appeals have followed such practice in similar situations. E. g., National Labor Relations Board v. Ford Motor Co., April 12, 1938, and January 18, 1940 (C. C. A. 6); National Labor Relations Board v. Oregon Worsted Co., 94 F. (2d) 671 (C. C. A. 9). This practice is particularly warranted here because of the indications of bad faith on respondent's part and the long delay in presenting its application to the Court. The facts sought to be adduced occurred on June 30, 1939, only 3 days after respondent had entered into a stipulation of settlement with the Board (supra, p. 2). Respondent at no time thereafter even acknowledged the demands of the Board for compliance with its agreement. Instead it has bided its time, and now, more than a year after the events which are alleged to have occurred, and 4 months after the Board has filed its petition for enforcement, when the case is scheduled shortly to come up for hearing, respondent for the first time presents an application which can serve only to cause further delay. This should not be permitted.

Conclusion

For the foregoing reasons, the application of petitioner should now be denied in full. If not now denied, it is submitted that the Court should pass decision upon the application until hearing on the merits of the case.

Respectfully submitted, Robert B. Watts, Associate General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 18th day of September, 1940.

ANSWER OF RESPONDENT—Filed November 14, 1940

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, NOVEMBER TERM, 1939

No. 9517

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

SOUTHPORT PETROLEUM COMPANY, Respondent

ANSWER OF RESPONDENT, SOUTHPORT PETROLEUM COMPANY, TO THE PETITION FILED HEREIN BY THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Fifth Circuit:

Now comes the Southport Petroleum Company, and in answer to the petition filed herein by the National Labor Relations Board for the enforcement of its order entered in said proceeding of the Board known as "In the matter of Southport Petroleum Company and Oil Workers' International Union Local #227, Case Nos. C-477 and R-600", this respondent respectfully represents:

I

This respondent has heretofore filed in this cause, a motion or application for leave to adduce additional material evidence to establish as a matter of record, that this respondent discontinued operating a refinery or conducting any business in the State of Texas, on or about June 30, 1939. That thereafter, on October 16, 1940, respondent corporation was formally dissolved, as is evidenced by the photostatic copy of certificate of dissolution attached hereto and made a part hereof; wherefore this respondent prays that this proceeding be dismissed and files this Answer without waiving the motion heretofore filed herein, or this motion to dismiss.

II

This respondent demurs generally to said petition and says that same is insufficient in law to require this respondent to answer herein, and of this respondent prays judgment of the Court.

III

This respondent admits that it was engaged in business in the State of Texas, within this Judicial District, until on or about June 30, 1939, but since said date this respondent has not engaged in the conduct of any refinery or business.

IV

This respondent admits that on August 4, 1938, the National Labor Relations Board entered its order stating its Findings of Fact and Conclusions of Law, and issued an order, part of which is copied in the petitioner's pleadings filed herein, wherein this respondent was ordered:

(1) To cease and desist from:

Discouraging membership in Oil Workers' International Union Local #227, or in any other labor organization, of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment, or any term or condition of employment.

(2) To take the following affirmative action:

(a) Offer to three (3) named employees, William Chester Cornish, E. D. Richey and Earl Gooch, immediate and full reinstatement to their former positions; and

(b) To make said three (3) employees whole for any loss of pay they have suffered by reason of their discharge; and

(c) To post certain notices at its Texas City refinery; and

(d) To notify the Regional Director for the 16th Region what steps the respondent took to comply therewith.

V

In connection with said order, this respondent respectfully avers that same was entered by the National Labor Relations Board on hearsay and inferences, and was not based on substantial evidence, and said order should in all things be set aside and held for naught by this Honorable Court.

In this connection, this respondent alleges that there is no evidence in the record that this respondent discouraged membership in the Oil Workers' International Union Local

=227, or in any other labor organization; that there is no substantial evidence in the record that this respondent interfered with, restrained or coerced its employees in the exercise of the right to self-organization, to form, join or assist labor organizations.

VI

Respondent further says that the order of the National Labor Relations Board, insofar as same required the reinstatement with back pay, of William Chester Cornish, was improper and should not be enforced by this Court, because the finding of said Board that Cornish was discharged because of his activity on behalf of the Oil Workers, has no substantial evidence to support it, the following facts appearing:

(a) Cornish admitted that Friday was his regular day off (Page 275, Rep. Pro.) and that he took all day off Tuesday, and was three hours late on Wednesday, the day of his discharge, without securing the permission of the superintendent or any superior in the refining plant, so to do. (Page 276, Rep. Pro.)

(b) There was a conflict in the evidence as to whether Cornish had notified his assistant of his intention to be off on Tuesday and late on Wednesday; there is in the record no evidence that any superior of Mr. Cornish knew of his intended absence from the plant, until Mr. Hinds, the superintendent of the plant, tried to locate him on Tuesday.

The fact that Mr. Cornish failed to report for work on Tuesday and was three hours late on Wednesday, without having first obtained the permission of any of his superiors so to do, constituted sufficient cause for his discharge; taken in connection with the fact that other and more active members of the same union were not discharged, this fact renders untenable and without foundation, the finding of the Board that he was discharged for union activity.

VII

Respondent further says that the order of the National Labor Relations Board, insofar as same required the re-

and should not be enforced by this Court, because the finding of said Board that Richey was discharged because of his activity on behalf of the Oil Workers, has no substantial evidence to support it, the following facts appearing:

(a) The only direct evidence of the reason for Richey's discharge was the testimony of V. Q. Davis, Richey's brother-in-law, and labor foreman, that Richey came to work on Wednesday evening, October 13, 1937, very much under the influence of intoxicating liquor (Page 576, Rep. Pro.); that Davis had thereupon obtained permission from Mr. J. C. Hinds, superintendent of the plant, to discharge Richey if he repeated the offense, and that Richey had come to work on the evening of Friday, October 15, 1937, "a little bit too drunk to work" (Page 576, Rep. Pro.); and the testimony of Mr. Hinds that he had granted Mr. Davis' request for permission to discharge Richey if he came out on the job intoxicated again (Pages 571, 572, Rep. Pro.).

(b) Richey admitted that he had been drinking "practically every evening" (Page 348, Rep. Pro.), and that about eight or ten days before he was discharged, Davis had told him if he "didn't quit running around to these saloons drinking that he was going to have to let me go" (Page 347, Rep. Pro.).

In this instance, there is direct and uncontradicted evidence that Richey drank; that he had been warned against drinking; that the management had granted the request of its foreman to discharge Richey if he returned to the job intoxicated, and that, in the opinion of the foreman, Richey had thereafter come to work "a little too drunk". Richey did not deny that he had been drinking before coming to work on the evening in question.

The undisputed evidence showing that the management was informed that Richey had come to work intoxicated on two occasions, good cause existed for his discharge, and no inference can be indulged that union activity was the cause of such discharge.

VIII

Respondent further says that the order of the National Labor Relations Board, insofar as same required the re-

instatement with back pay, of Earl Gooch, was improper and should not be enforced by this Court, because the finding of said Board that Earl Gooch was discharged because of his activity on behalf of the Oil Workers, has no substantial evidence to support it, the following facts appearing:

(a) That one Grady Suttles, who was a workman in the Kilgore plant of respondent, and senior in point of time of employment, had, at his own request, by reason of illness in his family, been transferred from Kilgore to Texas City (Page 380, Rep. Pro.); that Suttles was both a boilermaker and a Grade A welder, whereas, Earl Gooch was only a second class welder; that the transfer of Suttles to Texas City rendered unnecessary the further employment of Earl Gooch, for whom respondent thereupon obtained employment with a Mr. Ulmer, at Kilgore.

(b) That Earl Gooch was eligible for reemployment when respondent had work for him (Page 482, Rep. Pro.).

The fact that Earl Gooch was discharged for no other reason, than that his services were no longer needed by this respondent, renders untenable any assumption that Earl Gooch was discharged for union activity.

IX

This respondent admits that on June 27, 1939, its attorney, F. W. Fischer, entered into an agreement with the representatives of the National Labor Relations Board to settle this controversy by offering the above three (3) named employees reinstatement to their former positions, and to post specific notices, but did not agree to make whole any of said employees by reason of loss of salaries due to said discharge; that negotiations for said agreement were entered into, not because of the respondent's feeling of guilt on charges filed against it, but, because this respondent desired industrial harmony and peace in the operation of its refinery, and was willing to give the three (3) discharged employees another chance, rather than be embarrassed with prolonged litigation.

That some few days after such agreement was entered into, by and between the respondent's attorney and the petitioner, this respondent declared a liquidating dividend by the terms of which all the assets were divided among

its stockholders, and that the Texas City refinery was sold by the stockholders receiving the said property as their share of the liquidating dividend, to the Southport Petroleum Company of Delaware, a Delaware corporation, which is a separate and distinct entity and the stockholders in respondent have no interest, and never had any interest, directly or indirectly, in the stock ownership of the said Delaware corporation, all as set out in respondent's motion heretofore filed herein.

X

That the matters complained of and set out in Paragraph VI hereof, were objected to in Section Third, I, (a) of respondent's Exceptions to the Intermediate Report of the trial examiner filed in the proceedings before the Board; those complained of and set out in Paragraph VII were objected to in Section Third, I, (c) of said Exceptions, and those complained of and set out in Paragraph VIII were likewise objected to in Section Third, I, (b) of said Exceptions.

Wherefore respondent respectfully prays that this Honorable Court make and enter its order in this proceeding, with a Decree holding that there is no substantial evidence to justify the Board's order in this case, and dismissing this respondent; and for such other and further relief, general and special, in law and in equity, to which the respondent may be justly entitled.

Southport Petroleum Company, by Cornelius Kroll, President.

The State of Texas,
County of Harris:

Cornelius Kroll, being duly sworn, states that he was the duly qualified and acting President of the Southport Petroleum Company, a Texas corporation, on October 16, 1940; that said Southport Petroleum Company is not now operating any refinery or business; that he has read the foregoing answer subscribed by him and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

Cornelius Kroll.

Subscribed and sworn to before me this the 12th day of November, 1940. Luciel Decker, Notary Public

THE STATE OF TEXAS

Secretary of State

I, Claude A. Williams, Assistant Secretary of State, of the State of Texas, Do Hereby Certify, That Cornelius Kroll, President; M. M. Travis, Secretary, and Cornelius Kroll, Treasurer, of Southport Petroleum Company, a corporation duly and legally incorporated under the laws of the State of Texas, with its principal office at Kilgore, Gregg County, Texas, have this day filed in this office an agreement and consent in writing of stockholders owning all interest of all the outstanding stock of said corporation, consenting and agreeing that said Corporation be dissolved, together with a list of officers and directors of said Corporation, with the postoffice address and place of residence of each, said President, Secretary and Treasurer certifying that said consent to dissolution was the true and correct action of the stockholders.

I further certify that by reason of said action of the stockholders of said Southport Petroleum Company, said Corporation is dissolved.

In Testimony Whereof, I have hereto signed my name officially and have caused to be impressed hereon the Seal of State, at my office in the City of Austin, Texas, this the 16th day of October, A. D. 1940.

Claude A. Williams, Assistant Secretary of State.
(Seal.)

ARGUMENT AND SUBMISSION

Extract from the Minutes of December 2, 1940

No. 9517

NATIONAL LABOR RELATIONS BOARD

versus

SOUTHPORT PETROLEUM COMPANY

On this day this cause was called, and, after argument by Walter B. Wilbur, Esq., Attorney, National Labor Relations Board, for petitioner, and Harry Dow, Esq., for respondent, was submitted to the Court.

OPINION OF THE COURT—Filed January 4, 1941

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 9517

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

SOUTH PORT PETROLEUM COMPANY,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washingon, D. C.

(January 4, 1941.)

Before FOSTER, HUTCHESON, and HOLMES, Circuit Judges.

HOLMES, Circuit Judge: Pursuant to hearings had upon complaints filed by the Oil Workers International Union, Local No. 227, against the Southport Petroleum Company, the National Labor Relations Board found that the company was engaging in certain unfair labor practices. Accordingly, the Board ordered the company to cease and desist therefrom, and to take certain affirmative

action.[1] The order is before us on a petition to enforce, requiring us to determine whether it is supported by substantial evidence.

The entire order is based upon the findings of the Board that Cornish, Richey, and Gooch were discharged because of union activities and that, because of the discharges, the employees were interfered with and restrained in the exercise of their rights to organize and bargain collectively through representatives of their own choosing. We shall briefly summarize the evidence relating to the discharge of each, which evidence, in our opinion, adequately supports the findings made by the Board and the order entered thereon.

William Cornish was employed by the Southport Company on June 24, 1935. He was an electrician, and performed his work so well that he was repeatedly praised by his superiors and repeatedly raised in pay. He was one of the first to join the union, and became active in its efforts to organize the employees. He was elected vice-

[1] The order required the Southport Petroleum Company to cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to . . . employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights . . . guaranteed in Section 7 of the Act.

And to take the following affirmative action:

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice of their seniority and other rights and privileges;

(b) Make whole each of said men for loss of pay suffered by reason of their discharge by paying each a sum of money equal to that which he would normally have earned from the date of his discharge to the date of the offer of reinstatement, less the earnings of each, respectively, during said period;

(c) Post appropriate notices; and

(d) Notify the Regional Director, within ten days of the date of the order, of the steps taken to comply with the order.

president of the union, was named acting secretary of the Texas City branch, was a member of the Workmen's Committee, and chairman of the Organizing Committee. As a member of the Workmen's Committee, Cornish appeared before Lee LaFerney, the manager of the company, more than once in efforts to arrange a conference between the union and the management. He was discharged on Wednesday, August 4, 1937, when he appeared for work at 9:30, two-and-one-half hours after he was scheduled to begin work; he was delayed because of an appointment with his dentist that morning. Cornish failed to notify the management that he would be delayed, contenting himself with notifying his assistant. He testified that his presence was not imperative; that his assistant was capable of performing the routine duties; that he regularly took off one day a week, which day varied with the demands of his work, and of which he was required to give no notice to the management; that the occasion of his discharge was the only time he had been late during his entire employment with the company. On August 2, 1937, the company told an applicant for a job as electrician that they were contemplating making a change, and that he could expect employment soon.

E. D. Richey was discharged by his brother-in-law, a foreman in the plant, allegedly for repeatedly appearing for work in a drunken condition. The foreman testified that he had carried Richey home from work on several occasions in a drunken condition, and that he was too intoxicated properly to do his work on the day of his discharge. Richey denied that he was, or had ever been, drunk or drinking while performing his duties. Fellow workmen testified that they had never seen Richey drinking or drunk while working, and that, in their opinion, his work was satisfactory. The foreman acknowledged that, on each of the occasions when Richey was drunk,

he had assigned work to him. This work was of a nature that, if carelessly performed, might result in serious damage. Less than a month before his discharge, Richey was given the office of Steward in the union, and collected the dues of the members.

Earl Gooch was employed by the company for four-and-one-half years as a welder. He joined the union, was active in soliciting membership in it, was elected acting secretary, and served on the Organizing Committee. On August 4, 1937, which was the date on which Cornish was discharged, Gooch's employment was terminated, under the guise of a transfer, when he was sent to do welding work for an independent contractor engaged in construction work at a branch plant belonging to respondent. After that work was completed, Gooch was informed that he was no longer employed by the Southport Petroleum Company. The officers of the company testified that Gooch was discharged because the company no longer had sufficient welding work to keep him busy, and because his "outside interests" had seriously impaired the value of his services. Several employees testified that another man was transferred to take Gooch's place, and that two subordinate workmen were elevated to the rank of welder subsequent to his discharge.

When the organization of the union was in its inception, LaFerney called a meeting of the employees, at which he mentioned that there were "outside interests" working on the employees which were after the employees' money, not their welfare; and he cautioned the men to be careful. When the union committee went to LaFerney seeking a conference with the management, LaFerney declined the request. He told the committee that, if they knew what he knew about the executives of the union, they would go after them with a shotgun. M. M. Travis, secretary and

part owner of the company, testified that he objected to dealing with his employees through unions. At one time he told Gooch, "Mr. Lewis will look after himself, and it is up to you to look after yourself."

Prior to the discharges of these men, the union employees freely exhibited their union insignias, regularly attended the weekly meetings of the union, and participated in various union activities with enthusiasm. The membership steadily increased. After the three officers of the union were discharged, the members stopped working openly for it, membership lagged, attendance at the meetings dropped sharply, and the forward progress of the union was stopped.

When the treatment accorded each of these employees is considered in the light of the hostility of the management to the union, we think the finding of the Board that they were discharged because of union activities was fully warranted by the evidence. The men were officers in, and most active members of, the union, and their discharges followed closely upon their elevation to union offices. That the purpose of the management was realized is further attested by the cessation of overt union activities by the other employees of the company almost simultaneously with the discharges of the men. It was therefore a fair and reasonable inference of the Board that they were discharged because of their own activities.[2]

Respondent has filed in this court an application for leave to adduce additional evidence to the effect that, subsequent to the entry of the order by the Board, it disposed of all of its assets, and was dissolved. Respondent is a Texas corporation. Under the laws of that state the cor-

[2] International Association of Machinists 1. N. L. R. B. (November 1940), ... U. S. ....; The Solvay Process Co. 1. N. L. R. B. (5ith Circuit, Jan., 1941), ... F. (2) .....

poration, upon dissolution, is continued in existence for a period of three years for the purpose of suing and being sued.[3] Conceding that the dissolution has taken place, it can have no effect upon this proceeding.

Since the order of the Board is in all respects supported by substantial evidence, a decree will be entered directing that it be enforced.

[3] Articles 1388-9, Vernon's Texas Civil Statutes; Chevrolet Motor Co. of Texas v. Morris Auto Co., 269 S. W. 872; Eastman Gardiner & Co. v. Warren, 109 F. (2) 193.

JUDGMENT

Extract from the Minutes of January 4th, 1941

No. 9517

NATIONAL LABOR RELATIONS BOARD

versus

SOUTHPORT PETROLEUM COMPANY

This cause came on to be heard on the petition of National Labor Relations Board for the enforcement of the order of said National Labor Relations Board made on August 4, 1938, "In the Matter of Southport Petroleum Company and Oil Workers International Union, Local No. 227," Case Nos. C-447 and R-600, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that a decree will be entered directing that the order of the Board be enforced.

[fol. 123] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9517

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

SOUTHPORT PETROLEUM COMPANY, Respondent

PETITION FOR REHEARING—Filed January 23, 1941

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now Southport Petroleum Company, respondent in the above-entitled cause, and presents this, its petition for a rehearing, and in support thereof, respectfully sets forth:

(A) On August 4, 1938, the National Labor Relations Board rendered its order upon the usual proceedings had pursuant to Section 10 of the National Labor Relations Act, and ordered this respondent to cease and desist from:

[fol. 124] (a) Discouraging membership in Oil Workers' International Union, Local No. 227;

(b) In any other manner interfering with, restraining, etc., its employees in the exercise of the rights * * * guaranteed in Section 7 of the Act, and to take the following affirmative action:

(a) Offer certain named employees immediate and full reinstatement to their former positions, etc.

(b) Make whole each of said employees for lost pay suffered by reason of their discharge.

(c) Post appropriate notices; and

(d) Notify the regional director, within ten days of the date of the order, of the steps taken to comply with the order.

(B) On April 30, 1940, over one year and eight months after date of its order, the board filed in this Honorable Court a petition for the enforcement of its order of August 4, 1938, and a transcript of the entire record in the proceed-

ings before it in the matter of Southport Petroleum Company and Oil Workers' International Union, Local No. 227, the same being No. C-477 and R-600 National Labor Relations Board.

(C) This respondent filed in this Honorable Court an application for leave to adduce additional evidence to the effect that subsequent to the entry of the order by the board, its stockholders declared a liquidating dividend on June 30, 1939; said liquidating dividend consisting of all the assets of the corporation and said corporation discontinued operating its refinery and ceased doing business. [fol. 125] That this respondent also filed an answer in the proceedings before this Honorable Court urging the granting of said motion to refer the case back to the board for such additional evidence and in such answer further alleged that the respondent was formally dissolved on October 18, 1940, and attached to said answer was a certificate of dissolution issued by the Secretary of State of Texas.

(D) On January 4, 1941, this Honorable Court filed its opinion holding that the board's order should be enforced and that respondent should comply with the order briefly set out in Paragraph A, Subsections a, b, c and d herein.

Respondent respectfully submits that this Honorable Court should set aside its opinion filed herein and grant this respondent a rehearing on the following grounds:

1

This Honorable Court erred in refusing to grant respondent's application for leave to adduce additional evidence to the effect that subsequent to the entry of the order of the board, it disposed of all of its assets and was dissolved, because were such evidence made a matter of record, this Honorable Court would not have required a dissolved and nonexisting corporation to comply with mandatory orders requiring such affirmative action as offering reinstatement, posting notices, etc., etc., all of which this respondent was and is wholly unable to comply with because it no longer operates any business.

[fol. 126]

2

This Honorable Court erred in holding that Article 1388-9 of the Vernon's Annotated Civil Statutes were appli-

cable to a dissolved corporation which had discontinued doing business, by requiring such a corporation to take certain affirmative action, such as reinstating employees and posting appropriate notices, etc.

"* * * It may be that although the board's jurisdiction is not wholly lost (by reason of the dissolution of the corporation) that the scope of its order may be somewhat curtailed in view of the fact that even under the Michigan statute (practically same as the Texas law) the corporation ceases to exist for the purpose of continuing the business for which it was organized. An order which required for its compliance the continuation of such respondent's business as, for instance, the re-employment of unlawfully discharged employees, might well be beyond the power of the board * * *" N. L. R. B. v. Timken Silent Automatic Company, 114 F. 2d 449 (2 C. C. A.).

That the effect of this Honorable Court's order is to require respondent to resume operations which would necessitate the purchase of a refinery, crude oil, the reemployment of men, etc., and which a dissolved corporation, under the above article No. 1388, is not authorized to do.

Should respondent fail to reinstate the employees, or post the notices—neither of which it can do—or to make whole the employees ordered reinstated, and the respondent questions the authority of the board to require back pay since the date of its dissolution, the further effect of this Honorable Court's decision would be to place the respondent [fol. 127] in the unenviable position of being subject to contempt proceedings. Contempt action would attach to the former officials and stockholders of the respondent a stigma which the facts do not justify, and would, further, make difficult a proper presentation of those facts to this Honorable Court. It would be inconvenient for this Honorable Court itself to take testimony on the issue and the submission thereof on allegations by affidavit, including allegations based on information and belief, would, respondent fears, fail to give this Honorable Court an adequate appraisal of the situation which has arisen. See N. L. R. B. v. Bell Oil and Gas Company, 98 F. 2d 405 (C. C. A. 5).

3

That the Honorable Court's order in refusing to grant respondent's motion for leave to adduce the additional

evidence pertaining to its dissolution and discontinuance of operations was depriving this respondent of the rights given it by Section 10 (e) of the National Labor Relations Act, wherein it is provided:

"• • • If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board • • • the court may order such additional evidence to be taken before the Board • • • and to be made a part of the transcript. • • •"

The United States Supreme Court has construed this section as follows:

[fol. 128] "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points. • • •" Ford Motor Co. v. N. L. R. B., 305 U. S. 364.

See, also, Mooresville Cotton Mills v. N. L. R. B., 94 F. 2d 61 (C. C. A. 4) and Mooresville Cotton Mills v. N. L. R. B., 97 F. 2d 959 (C. C. A. 4).

4

This Honorable Court erred in enforcing an order of the board on its petition filed in this court on April 30, 1940, or over a year and eight months after the date of the board's order, because the board did not act promptly in filing the petition and the long delay had the effect of making unenforceable the provisions of the board's order. N. L. R. B. v. Lasalle Hat Co., 105 F. 2d 709 (C. C. A. 3).

5

This Honorable Court erred in failing to take into consideration the verified statement of the respondent contained in its motion to adduce additional evidence that it had dissolved and discontinued doing business on June 30, 1939, and limiting the amount of recovery, if any, of the

discharged employees, Cornish, Rickey and Gooch, to such date of discontinuance of operations by respondent.

6.

This Honorable Court erred in ordering respondent to make whole the three named employees for loss of pay, [fol. 129] if any, suffered by reason of their discharge, because a prerequisite to such an order is the ability of the employer to reinstate such employees, and since the dissolved respondent is unable to reinstate any of its former employees, it should not be subject to any order "to make whole" such employees.

"* * * while the Act permits the board to reinstate with or without back pay, it does not, I think, permit an award of back pay without reinstatement. * * *" N. L. R. B. v. Carlisle Lbr. Co., 99 F. 2d, p. 533 (C. C. A. 9).

To require respondent "to make whole" certain employees which it can not reinstate would be in the nature of a punishment and "the powers granted the board under Section 10 (c) are only remedial, they are designed to enable it to restore the status quo as nearly as possible, had the wrong not been committed: further it may not go." N. L. R. B. v. Remington Rand Inc., et al., 94 F. 2d 862 (C. C. A. 2), certiorari denied 304 U. S. 576, rehearing denied 304 U. S. 590.

7

The Honorable Court erred in sustaining the Board's findings that the three employees named were discharged on account of labor activity, because there was no substantial evidence to sustain such finding and from their own testimony (Cornish having admitted that he took off certain days and came to work late another day, without permission from his employer, see respondent's appendix, pages 2, 3, 6 and 7; Richey admitted that he continuously indulged in intoxicants, although warned by his foreman, [fol. 130] see respondent's appendix, pages 9 and 10; and Gooch admitted that a senior and more experienced employee was placed in his position, see respondent's appendix pages 13, 21, 22, 34 and 35) respondent would have been justified in discharging them had there been no effort to organize its employees. N. L. R. B. v. Thompson Pro-

ducts, Inc., 97 F. 2d 13 (C. C. A. 6). N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 44; N. L. R. B. v. Union Pacific Stages, 99 F. 2d 153 (C. C. A. 9); Agwelines, Inc., v. N. L. R. B., 87 F. 2d 146 (C. C. A. 5).

Wherefore, upon the foregoing grounds, and for the reasons hereinbefore set forth, its is respectfully urged that this petition for rehearing be granted and that the order of the board as now affirmed by this Honorable Court be, upon further consideration, reversed.

Respectfully submitted, Harry Dow, Attorney for Southport Petroleum Company, Respondent.

Certificate of Counsel

I, Harry Dow, hereby certify that I am the attorney and counsel for Southport Petroleum Company, the respondent in the above-entitled proceeding, and that the foregoing petition for rehearing is not presented for purposes of delay or vexation, but is, in my opinion, well founded in law and, fact and proper to be filed herein.

Harry Dow, Attorney for Southport Petroleum Company, Respondent.

[fol. 131] In United States Circuit Court of Appeals

No. 9517

National Labor Relations Board,

versus

Southport Petroleum Company

Order Denying Rehearing—February 1, 1941

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 132] In United States Circuit Court of Appeals

No. 9517

National Labor Relations Board,

versus

Southport Petroleum Company

Decree—February 26, 1941

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order en-

tered on August 4, 1938, "In the Matter of Southport Petroleum Company and Oil Workers International Union, Local No. 227, Case C-477," and was argued by counsel;

On consideration whereof, and this Court on January 4, 1941, having rendered its opinion directing that the aforesaid order of the Board be enforced, it is now hereby

Ordered, Adjudged, and Decreed that Southport Petroleum Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

[fol. 133] (b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

(b) Make whole William Cornish, E. D. Richey, and Earl Gooch for any loss of pay they have suffered by reason of their discharge by payment to each of them, respectively, of a sum of money equal to that which he would normally have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less the net earnings of each, respectively, during said period;

(c) Post immediately notices in conspicuous places at its Texas City, Texas, refinery stating that the respondent will cease and desist in the manner aforesaid, and maintain said notices for a period of thirty (30) consecutive days from the date of posting;

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[fols. 134-137] (d) Notify the Regional Director for the Sixteenth Region within ten (10) days from the date of this order what steps the respondent has taken to comply herewith.

(Signed) Rufus E. Foster, Judge, United States Circuit Court of Appeals for the Fifth Circuit. (Signed) Joseph C. Hutcheson, Jr., Judge, United States Circuit Court of Appeals for the Fifth Circuit. (Signed) Edwin R. Holmes, Judge, United States Circuit Court of Appeals for the Fifth Circuit.

Dated: February 26th, 1941.

[fol. 138] Supreme Court of the United States

Order Allowing Certiorari—Filed June 2, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the question of the correctness of the denial by the Circuit Court of Appeals of the petitioner's motion to remand to the National Labor Relations Board for further evidence.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 139] In Supreme Court of the United States

Stipulation as to Record—Filed July 28, 1941

Subject to this Court's Approval, it is hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, that the printed record may consist of the following:

The supplemental proceedings before the United States Circuit Court of Appeals for the Fifth Circuit appearing at pages 96 to 130 inclusive, of the transcript of the record, and the decision and order of the National Labor Relations

Board set forth at pages 61 to 84, inclusive, of the transcript, and the stipulation signed June 27, 1939, pages 89 to 92, inclusive, of the transcript.

The Court may consider matters contained in all other printed volumes filed in the United States Circuit Court of Appeals for the Fifth Circuit and transferred to the office of the Clerk of the United States Supreme Court and consisting of the following:

a. Volume I, Transcript of Record;
b. Appendix to Petitioner's brief;
c. Appendix to respondent's brief.

Morris D. Meyer, Harry Dow, Attorneys for Southport Petroleum Co.

Dated at Houston, Texas, this 21st day of July, 1941.

Charles Fahy, Acting Solicitor General, Solicitor General of the United States.

Dated at Washington, D. C., this 26th day of July, 1941.

[fol. 140] [File endorsement omitted.]

Endorsed on Cover: Enter Morris D. Meyer, File No. 45,361. U. S. Circuit Court of Appeals, Fifth Circuit, Term No. 67. Southport Petroleum Company, Petitioner, vs. National Labor Relations Board. Petition for a writ of certiorari and exhibit thereto. Filed May 1, 1941. Term No. 67 O. T. 1941.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 1 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. ~~1012~~ 67

SOUTHPORT PETROLEUM COMPANY,
PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

HARRY DOW,
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Counsel for Petitioner.

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NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Supreme Court of the United States:

Southport Petroleum Company, a corporation, heretofore organized and operating under the laws of the State of Texas, respectfully prays this court, by certiorari, to review and determine cause No. 9517, styled *National Labor Relations Board, Petitioner, vs. Southport Petroleum Company, Respondent,* wherein the Circuit Court of Appeals for the Fifth Circuit at New Orleans has rendered final judgment sustaining and enforcing an order of the National Labor Relations Board requiring

this respondent to take certain affirmative action such as reinstating employees and posting notices, and has overruled a motion of this respondent to adduce additional evidence to the effect that this respondent discontinued operations on June 30, 1939, and was therefore not capable of complying with that part of the court's order requiring such affirmative action as reinstatement of employees and posting of notices.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On August 4, 1938, the National Labor Relations Board rendered its order upon the usual proceedings had pursuant to Section 10 of the National Labor Relations Act, and ordered this respondent to cease and desist from:

(a) Discouraging membership in Oil Workers' International Union Local No. 227;

(b) In any other manner interfering with, restraining, etc., its employees in the exercise of the rights * * * guaranteed in Section 7 of the Act, and to take the following affirmative action:

(a) Offer certain three named employees immediate and full reinstatement to their former positions, etc.:

(b) Make whole each of said employees for lost pay suffered by reason of their discharge;

(c) Post appropriate notices; and

(d) Notify the regional director, within ten days of the date of the order, of the steps taken to comply with the order.

On April 30, 1940, over one year and eight months after date of its order, the board filed in the Circuit Court of Appeals for the Fifth Circuit a petition for the

enforcement of its order of August 4, 1938, and a transcript of the entire record in the proceedings designated as "*In the Matter of Southport Petroleum Company and Oil Workers' International Union, Local No. 227*, No. C-477, and R-600 National Labor Relations Board.

This petitioner (respondent in the circuit court of appeals, and herein also referred to as respondent) thereupon filed a motion (pages 97-100 Transcript of Record) in said court for leave to adduce additional evidence to the effect that subsequent to the entry of the order of the board, its stockholders declared a liquidating dividend, June 30, 1939, said dividend consisting of all of the assets of the corporation, and said corporation discontinued operating its refineries and ceased doing business and was, therefore, not in a position to reinstate employees or post notices. This motion was filed in pursuance to the provisions of Section 10 (e) of the National Labor Relations Act, 49 Stat. 453; 29-30 U. S. C. A., Pocket Parts, 1940, page 98. This petitioner further filed an answer in the circuit court of appeals urging the granting of said motion, and further alleged that it was formally dissolved on October 18, 1940, and attached to such answer was a certificate of dissolution issued by the secretary of the State of Texas (pages 107-114 Transcript of Record).

On January 4, 1941, the circuit court of appeals rendered its opinion overruling the motion and holding that the board's order should be enforced. This petitioner filed its petition for rehearing on January 23, 1941, within 21 days after entry of judgment or in accordance with the requirement of Rule 29 of said circuit court of appeals, which motion was overruled by said Honorable Court on February 1, 1941 (page 127 Transcript of Record). On February 26, 1941, said circuit court of appeals entered its decree (pages 128-130 Transcript of Record) requiring this petitioner to comply with the order of the board, notwithstanding the verified motion that petitioner had discontinued activities on June 30, 1939.

II.

OPINION BELOW.

The opinion of the Honorable United States Circuit Court of Appeals for the Fifth Circuit is reported in Volume 117, Federal Reporter, Second Series, pages 90, 91 and 92, and styled *National Labor Relations Board* v. *Southport Petroleum Company*.

III.

JURISDICTIONAL STATEMENT.

1. The statutory provisions relied upon to sustain jurisdiction is Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. A. 347.

2. The opinion of the circuit court of appeals was rendered on January 4, 1941. The petition for rehearing in said court was filed on January 23, 1941, or within the 21 days period allowed for the filing of such petition by Rule 29 of the Rules of the United States Circuit Court of Appeals for the Fifth Circuit. Rehearing was denied by said court on February 1, 1941, and the judgment or decree of the circuit court of appeals is dated February 26, 1941. This petition for writ of certiorari is filed within three months of the date of the overruling of the petition for rehearing and within three months of the date of the final judgment or decree of said circuit court of appeals. 28 U. S. C. A. 350.

IV.

QUESTIONS PRESENTED.

1. Should the motion of the petitioner to refer the case to the National Labor Relations Board for leave to adduce additional evidence duly supported by affidavit of

the petitioner to the effect that petitioner discontinued operating its refineries on June 30, 1939, by declaring a liquidating dividend of all of its assets and was therefore not in a position to comply with such mandatory order as reinstatement of employees and posting notices, have been granted by the Honorable Circuit Court of Appeals?

2. Do the provisions of Section 10 (e) of the National Labor Relations Act, 49 Stat. 453, 29 U. S. C. A., 1940 Cumulative Annual, Pocket Part 160, page 98 entitle a respondent, who files a verified motion to the effect that such respondent has discontinued operations and is dissolved and is willing to make proof thereof, to have the case referred back to the board for this purpose of completing the record where such dissolution took place after the hearing before the trial examiner and after the board issued its order thereon?

3. Should the circuit court of appeals have required petitioner who is not engaged in any active business to reinstate three discharged employees and post notices or should it have granted petitioner's motion and referred the case back to the board for findings as to when the corporation discontinued operations and whether the new corporation operating the refinery was a successor or assignee of the petitioner in order to have all of the facts upon which to render a decree that could be complied with or enforced?

4. Should an order of the National Labor Relations Board rendered August 4, 1938, be enforced by the circuit court of appeals on petition filed April 30, 1940, or over one year and eight months after the date of the order where petitioner in the interim had discontinued operating its business and filed a motion for leave to make proof of such cessation of activities on June 30, 1939?

5. Did the Honorable Circuit Court of Appeals properly require the petitioner to "make whole" any loss of

three discharged employees without limiting the time to June 30, 1939, the date petitioner discontinued to operate its refinery, as shown by verified motion setting up such fact and praying for an opportunity to make proof thereof before a representative of the National Labor Relations Board?

6. Should an employer be required to reinstate three discharged employees where the record reflects that although such employees were active in the union, one admitted that he continuously indulged in intoxicants after being warned to cease such habits; and a second admitted he took off certain days and came to work an hour and a half late without permission of his employer; and a third admitted that he was replaced by a senior employee?

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Honorable Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Honorable Court. The Honorable Circuit Court of Appeals decided that even though a respondent in a labor case has dissolved and discontinued operations after the board made its order, it will nevertheless enforce such mandatory orders requiring such respondent to reinstate discharged employees and post notices, thus requiring such respondent to resume operations or expose such respondent to contempt proceedings.

2. The decree of the Honorable Circuit Court of Appeals in denying respondent's motion to adduce additional evidence and thus complete and correct the record is in conflict with the opinion of this Honorable Court in the

case of *Ford Motor Company* v. *N. L. R. B.*, 305 U. S. 364, where such right was afforded the National Labor Relations Board.

3. The Honorable Circuit Court of Appeals for the Fifth Circuit has rendered its decision requiring the payment of back wages to discharged employees where such discharged employees cannot be reinstated (by reason of the fact that the petitioner is not engaged in any activity) which is contrary to the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *National Labor Relations Board* v. *Carlisle Lumber Company*, (1938) 99 F. 2d 533, writ of certiorari denied in 1939, 306 U. S. 646, 59 S. Ct. 586, wherein the court held that the law does not permit an award for back pay without reinstatement because the back pay provision is connected with and dependent upon the reinstatement provision.

4. The Honorable Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decision, in that the Honorable Circuit Court of Appeals apparently decided that the provisions of Article 1388 of the 1939 Vernon Texas Annotated Civil Statutes* requires such corporation to resume operation and to reinstate discharged employees and post certain notices required by the board.

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*Article 1388: "Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority, of said company over such assets and property. Said trustees shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands."

VI.

SUPPORTING BRIEF AND ARGUMENT.

In order for the Honorable Circuit Court of Appeals to have entered an enforcible decree, the transcript should have contained the findings of the board on the matters set out in the petitioner's motion to adduce additional evidence. The petitioner contended that it discontinued all operations on June 30, 1939, by a declaration of a liquidating dividend whereby the property of the corporation was divided among its four stockholders, two stockholders accepting the refinery at Texas City, Texas, and the other two stockholders accepting the refinery at Kilgore, Texas. The refinery at Texas City, where the labor trouble existed was sold by the stockholders receiving same as a liquidating dividend to a Delaware corporation. In its verified motion the petitioner set up that none of its stockholders had any interest in the Delaware corporation and that the owners of stock in the Delaware corporation at no time ever owned any stock of the petitioner, which was the Texas corporation. Petitioner was prepared to prove that its dissolution was in good faith, that it discontinued all operations of its plant on June 30, 1939, and that any award of back pay should have been limited to that date.

Had the motion been granted, the board would have likewise had an opportunity to attempt to prove that the Delaware corporation was a successor or assignee of the petitioner and the petitioner was prepared to meet such charge in the proper forum. The Honorable Circuit Court of Appeals in its opinion overruled the motion by reason of Article 1388 of the Revised Civil Statutes of Texas which provides that a corporation upon dissolution continues to exist for a period of three years for the purpose of suing and being sued. The Honorable Circuit Court states:

> "Conceding that the dissolution has taken place, it can have no effect upon this proceeding."

This petitioner submits that if the dissolution took place, then the order of the court requiring discharged employees to be "made whole" should have been limited to the date of such dissolution, June 30, 1939, and that the order should be modified not requiring the petitioner to reinstate discharged employees and post notices. The order of the board and the decision of the Honorable Court sustaining the order required the petitioner herein (respondent below) to resume operations. This is not the intention of Article 1388.

Petitioner recognizes that under Article 1388 it can be sued for a debt or it can sue for a debt but there are no interpretations of said article to require a dissolved corporation to resume operations in order to post notices and reinstate discharged employees.

The board in urging that the motion to adduce additional evidence should be overruled relied on this Honorable Court's decision in the case of *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261-272, 82 L. Ed. 831, and related cases. Casual examination of the facts in such cases will reflect that the respondent obeyed the order of the board and filed motions to make proof that they obeyed such order and to dismiss the proceedings by reason of their compliance with the order. This court properly stated:

> "But an order of the character made by the board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

However, in the case at bar petitioner wishes to make proof that its dissolution took place after the hearing before the examiner and after the order of the board and therefore could not have been presented at such hearing and that any liability should be limited to "making whole"

discharged employees to a certain date and that mandatory requirements such as reinstatement and posting notices should not be made of a dissolved corporation which has discontinued all activities.

In the case of *N. L. R. B.* v. *Timken Silent Automatic Company*, 114 F. 2d 449 (2 C. C. A.), the court pointed out as follows:

> "* * * It may be that although the board's jurisdiction is not wholly lost (by reason of the dissolution of the corporation) that the scope of its order may be somewhat curtailed in view of the fact that even under the Michigan statute (practically same as the Texas law) the corporation ceases to exist for the purpose of continuing the business for which it was organized. An order which required for its compliance the continuation of such respondent's business as, for instance, the re-employment of unlawfully discharged employees, might well be beyond the power of the board * * *"

In construing Section 10 (e)* of the National Labor Relations Act, this Honorable Court held in the case of *Ford Motor Company* v. *N. L. R. B.*, 305 U. S. 364:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

The effect of the Honorable Court's order is to require respondent to resume operations which would necessitate the purchase of a refinery, crude oil, the re-employment of men, etc., and a dissolved corporation under Atricle 1388 is not authorized to do this.

Sec. 10 (e) " * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board * * * the court may order such additional evidence to be taken before the board * * * and to be made a part of the transcript * * *."

Should respondent fail to reinstate the employees, or post the notices—neither of which it can do—or to make whole the employees ordered reinstated, and the respondent questions the authority of the board to require back pay—certainly since the date of its dissolution—the further effect of said Honorable Court's decision would be to place the respondent in the unenviable position of being subject to contempt proceedings. Contempt action would attach to the former officials and stockholders of the respondent a stigma which the facts do not justify, and would further make difficult a proper presentation of those facts to the Honorable Court. It would be inconvenient for the Honorable Court itself to take testimony on the issue and the submission thereof on allegations by affidavit, including allegations based on information and belief, would, respondent fears, fail to give said Honorable Court an adequate appraisal of the situation which has arisen. See *N. L. R. B.* v. *Bell Oil and Gas Co.*, 98 F. 2d 405 (C. C. A. 5).

The long delay of the board in filing its opinion to enforce its order had the effect of making unenforcible the provisions of said order. *N. L. R. B.* v. *La Salle Hat Company*, 105 F. 2d 709 (C. C. A. 3).

The Ninth Circuit Court of appeals in the case of *N. L. R. B.* v. *Carlisle Lumber Company*, 99 F. 2d p. 533, held that:

> "* * * while the Act permits the board to reinstate with or without back pay, it does not, I think, permit an award of back pay without reinstatement."

This is apparently in conflict with the holding of the Honorable Circuit Court of Appeals in the case at bar and is also in conflict with the holding of the Fourth Circuit Court of Appeals, in the case of *Mooresville Cotton Mills* v. *N. L. R. B.*, (1938) 94 ~~95~~ F. 2d 61, (CCA 4) modified on rehearing 1938, 97 F. 2d 959, where it was said that back pay might be awarded without reinstatement because "it would not offend the terms of the act, would do justice

to the worker and tend to effectuate the policies of the act."

To require the petitioner to "make whole" certain employees which it can not reinstate would be in the nature of a punishment and "the powers granted the board under Section 10 (c) are only remedial, they are designed to enable it to restore the *status quo* as nearly as possible had the wrong not been committed; further it may not go." *N. L. R. B.* v. *Remington Rand, Inc., et al.*, 94 F. 2d 862 (C. C. A. 2), certiorari denied 304 U. S. 576, rehearing denied 304 U. S. 590.

In connection with the discharge of the employees, the respondent below took the position that in operating an oil refinery sobriety on the part of its employees is absolutely essential for the safety of his fellow employees and respondent's property, and therefore it was justified in discharging a certain employee, Richey, who admitted that he had continuously indulged in intoxicants although warned by his employer to discontinue such habits (see respondent's Appendix pages 9 and 10). There was conflicting evidence as to whether such employee was drunk on a certain day when he appeared for work but there was no conflicting evidence that he continuously indulged in intoxicants and had been warned to discontinue and therefore the respondent was justified in the exercising of its normal right of hiring and discharging employees to discharge such employee, notwithstanding such conflicting evidence as to the intoxication of such employee on a certain date. The respondent was likewise justified in discharging its other two employees, Cornish having admitted that he took off certain days and came to work late another day without permission from his employer (see respondent's Appendix pages 2, 3, 6 and 7) and Gooch having admitted that a senior and more experienced employee was placed in his position (see respondent's Appendix pages 13, 21, 22, 34 and 35). Respondent would have been justified in discharging them had there been

no effort to organize its employees. *N. L. R. B.* v. *Thompson Products, Inc.*, 97 F. 2d 13 (C. C. A. 6); *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44; *N. L. R. B.* v. *Union Pacific Stages*, 99 F. 2d 153 (C. C. A. 9); *Agwelines, Inc.*, v. *N. L. R. B.*, 87 F. 2d 146 (C. C. A. 5).

Prayer.

This petitioner respectfully submits that the Honorable Circuit Court of Appeals should have granted the motion to adduce additional evidence so that all the facts could appear in the transcript and form the basis for the rendition of an enforcible order, and this petitioner prays that certiorari be granted and, upon submission, for reversal with proper orders.

Respectfully submitted,

HARRY DOW,
MORRIS D. MEYER,
Counsel for Petitioner, Southport Petroleum Company.

No. ~~1013~~ 67

In the Supreme Court of the United States

OCTOBER TERM, 1940

SOUTHPORT PETROLEUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 112–117)[1] is reported in 117 F. (2d) 90. The findings of fact, conclusion of law, and order of the National Labor

[1] Pursuant to a stipulation of the parties (R. 129–130), the printed record for purposes of the petition for certiorari consists of: (1) a printed volume entitled "Transcript of Record," which is referred to herein by the symbol (R.) and which contains the complaint, the decision of the Board, and various other proceedings; (2) the appendix to petitioner's brief filed in the court below, which is not referred to herein; and (3) the appendix to the Board's brief filed in the court below, which is referred to herein by the symbol (B. A.).

Relations Board (R. 61–84) are reported in 8 N. L. R. B. 792.

JURISDICTION

The decree of the court below (R. 127–128) was entered on February 26, 1941. The petition for a writ of certiorari was filed on May 1, 1941, and served on May 15, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (Pet. 4).

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the Board's findings that petitioner discriminatorily discharged three of its employees in violation of Section 8 (3) and (1) of the National Labor Relations Act.

2. Whether an order of the Board appropriate to remedy unfair labor practices and directed to petitioner, its officers, agents, successors, and assigns, became invalid or moot by reason of an alleged dissolution of petitioner occurring after the order's issuance, and whether the court below was, upon motion by petitioner, required to withhold enforcement of the Board's order and to remand the proceeding to the Board for the production of evidence concerning the alleged dissolution.

3. Whether the court was required to deny enforcement to the Board's order by reason of the fact that a period of 20 months elapsed between the issuance of the order and the filing of a petition for enforcement by the Board.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Supp. V, Section 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 61–84). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

During the spring of 1937 petitioner, through the manager of its refinery at Texas City, Texas, pointedly expressed its hostility and opposition to the Oil Workers International Union, Local No. 227, which was then attempting to organize the refinery employees (R. 71; B. A. 16, 19–20, 23–24, 32, 34, 41, 47–48, 61). On August 4, 1937, petitioner discharged the vice president and secretary of the Local, William Cornish and Earl Gooch; these men were competent employees of 2 and 4½ years' service, respectively, and were among the most active members of the union (R. 74, 75, 76; B. A. 22, 29, 30, 31, 32, 33, 36, 42, 61–62, 70–71). Petitioner's explanations of the discharges did not reflect the true reasons therefor (R. 74–75, 76–78; B. A. 37,

[2] In the following statement the references preceding the semicolon are to the Board's findings, and the succeeding references are to the supporting evidence. Jurisdictional facts are omitted since no question as to jurisdiction is raised.

40, 63–65, 74, 77–78, 85–86, 99–101). Petitioner also discharged E. D. Richey, a competent employee of 2 years' service and an outstandingly active member of the union (R. 72; B. A. 52, 53). The Board found that Richey's union activities constituted the sole ground for his discharge (R. 72–73; B. A. 57, 58, 59, 69, 72, 82–84, 92, 93, 112).

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (3) and (1) of the Act (R. 73–75, 78).[3] Upon the foregoing findings the Board issued its usual order requiring petitioner, its officers, agents, successors, and assigns, to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to the discriminatorily discharged empoyees, and to post notices (R. 82–83).

On April 30, 1940, the Board filed in the court below a petition for enforcement of its order (R. 1–7). Thereafter petitioner filed with the court an application for leave to adduce additional evidence that on June 30, 1939, it had declared a liquidating dividend of all its assets among its four stockholders and that the Texas City refinery had been distributed to two of the stockholders who thereafter conveyed the property to a new corporation whose stockholders had never owned any of petitioner's

[3] The Board dismissed the complaint insofar as it alleged that petitioner had refused to bargain collectively in violation of Section 8 (5) and had discharged Edward A. Patricio in violation of Section 8 (3) (R. 66–70, 78–79, 82, 83).

stock (R. 96–98). The Board filed its opposition to this application (R. 99–104). Thereafter petitioner filed an answer to the enforcement petition (R. 105–111).

On January 4, 1941, the court below handed down its opinion (R. 112–117) denying the motion to adduce additional evidence and enforcing the Board's order in full. A petition for rehearing filed by petitioner (R. 119–126) was denied on February 1, 1941 (R. 127). A decree was entered pursuant to the court's opinion on February 26, 1941 (R. 127–128).

ARGUMENT

1. Petitioner's contention (Pet. 12–13) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence referred to in the Statement (*supra*, pp. 3–5) affords abundant support for the challenged findings.

2. Petitioner contends (Pet. 6–8) that the court should not have enforced the Board's order, but should have granted petitioner's motion to remand the case to the Board to adduce evidence concerning the asserted dissolution of petitioner (*supra*, p. 4). But such evidence was plainly not "material" within the meaning of Section 10 (e) of the Act (*infra*, pp. 11–12). *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305

U. S. 197, 230.[4] It was not relevant in any way to the sole question before the court—whether the Board's order was "lawful when made" (*Pennsylvania Greyhound* case, *loc. cit. supra*)—but was relevant only to the question concerning the extent of action required to comply with the Board's order if the order was enforced by the court.[5] The resolution of questions of this kind in proceedings for enforcement or review of a Board order

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[4] See also *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497, 498 (C. C. A. 5); *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 541 (C. C. A. 9), certiorari denied, 306 U. S. 646.

[5] Plainly, insofar as the Board's order was directed to petitioner's "officers, agents, successors, and assigns" (R. 82), its validity was entirely unaffected by petitioner's alleged dissolution. *National Labor Relations Board* v. *W. C. Bachelder, receiver for Hoosier Veneer Co.*, decided March 13, 1941 (C. C. A. 7); *Bethlehem Steel Co.* v. *National Labor Relations Board*, decided May 12, 1941 (C. A. D. C.); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6). And even so far as petitioner itself is concerned, it may not be contended that the dissolution prevented petitioner from taking any action whatsoever to comply with the court's decree. Petitioner continues to exist for certain purposes (Vernon's Annotated Civil Statutes of Texas [1939], Art. 1388); included within these purposes would be at least the payment of back pay in compliance with the decree. Further, petitioner may be required to obtain performance by its agents of any provisions which it is incapable of performing itself. *National Labor Relations Board* v. *Hopwood Retinning Co., Inc.*, 98 F. (2d) 97, 102, on contempt, 104 F. (2d) 302, 304 (C. C. A. 2).

might involve repeated remands to the Board for the purpose of adducing additional evidence. If the Act is to be workable, questions relating to the extent of compliance should be left to adjustment by agreement of the parties or in supplemental proceedings, after the validity of the order has been determined and its enforcement decreed.[6]

Petitioner's assertion (Pet. 6–7, 10) that the court's denial of the motion for leave to adduce additional evidence is in conflict with the decision of this Court in *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, is plainly without merit. That case involved only the propriety of the remand by the Circuit Court of Appeals to the Board to remedy alleged procedural defects and omissions which were asserted to invalidate the Board's order. There are no such defects or omissions here. Further, the question whether it would have been error for the Circuit Court of Appeals to refuse a remand was not before this Court in that case.

3. Upon the assumption that the reinstatement provisions of the Board's order are not enforceable by reason of petitioner's asserted dissolution, peti-

[6] See *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 421–422 (C. C. A. 2); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. C. A. 9), cert. denied, 306 U. S. 646; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 194, 196 (C. C. A. 9); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 197–198 (C. C. A. 9).

tioner contends (Pet. 7, 11–12) that the enforcement of the back-pay provisions is in conflict with *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9), certiorari denied, 306 U. S. 646. The Board's power to direct back pay although the normal reinstatement remedy is withheld was sustained in *Phelps Dodge Corp.* v. *National Labor Relations Board*, Nos. 387, 641, this Term, decided April 28, 1941.[7] Further, in *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 664 (C. C. A. 9), the court held that the rule of the *Carlisle Lumber* case applied only where reinstatement could not be required at the

[7] In the *Phelps Dodge* case the Circuit Court of Appeals expressly held that the Board could require back pay in the absence of reinstatement and enforced the Board's order of back pay to one employee who had become unemployable prior to the Board's order; the court also held that the back pay order was valid as to those individuals whom it considered to be beyond the Board's reinstatement power because they obtained substantially equivalent employment. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. (2d) 202, 205–206 (C. C. A. 2). The Company's petition for certiorari expressly challenged this holding (Pet. for certiorari, No. 387, this Term, p. 15), and the point was briefed (Brief for *Phelps Dodge Corp.*, Nos. 387, 641, this Term, pp. 44–45; Brief for the National Labor Relations Board, Nos. 387, 641, this Term, pp. 43–44). This Court sustained the decision of the Circuit Court of Appeals as to the striker who became unemployable; in view of this Court's disposition of the substantially equivalent employment question, it was unnecessary to pass upon the Board's power to order back pay without reinstatement to the strikers who obtained such employment.

time of the Board's order; the court enforced a back-pay order although reinstatement had been rendered impossible by circumstances arising after issuance of the Board's order.

4. Petitioner contends (Pet. 5, 11) that the Board's failure, for a period of 20 months* after issuance of its order, to file a petition for enforcement under Section 10 (e), rendered the order "unenforceable." The short answer is that at any time during the period of delay complained of petitioner was free to file a petition to review and set aside the Board's order under Section 10 (f) of the Act. *National Labor Relations Board* v. *Nebel Knitting Co., Inc.*, 103 F. (2d) 594, 595 (C. C. A. 4). Moreover, the defense of laches is not available in a proceeding brought by an agency of the Federal Government. *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123; *Board of Commissioners* v. *United States*, 308 U. S. 343. Petitioner's claim is of a type which has been uniformly rejected under the Act. See, *e. g.*, *Phelps Dodge Corp.* v. *National Labor Relations Board*, Nos. 387, 641, this Term, decided April 28, 1941; *Triplex Screw Co.* v. *National Labor Relations Board*, de-

* The delay is attributable, in part, to these circumstances: On June 27, 1939, petitioner executed a settlement agreement wherein it agreed to comply with the Board's order (R. 89-92). Respondent thereafter failed to comply with this agreement and the Board, in April 1940, filed its enforcement petition (see R. 100).

cided March 14, 1941 (C. C. A. 6); *National Labor Relations Board* v. *Superior Tanning Co.* (C. C. A. 7), certiorari denied, No. 784, this Term.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1941.

APPENDIX

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. V, Sec. 151, *et seq.*):

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SEC. 10. (e) * * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its

member, agent, or agency, and to be made a part of the transcript. * * *

SEC. 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941

No. 67

In the Supreme Court of the United States

OCTOBER TERM, 1941

SOUTHPORT PETROLEUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

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SOUTHPORT PETROLEUM COMPANY, PETITIONER

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NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 40–45) is reported in 117 F. (2d) 90. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1–20) are reported in 8 N. L. R. B. 792.

JURISDICTION

The decree of the court below (R. 52–54) was entered on February 26, 1941. A petition for rehearing (R. 47–52) was denied on February 1,

1941 (R. 52). The petition for a writ of certiorari was filed on May 1, 1941, and was granted on June 2, 1941, limited to the question of the correctness of the denial by the Circuit Court of Appeals of petitioner's application to that court for leave to adduce additional evidence before the Board (R. 54). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

The sole question presented is whether in the circumstances the Circuit Court of Appeals erred in denying petitioner's application for leave to adduce additional evidence before the Board to the effect that, subsequent to the issuance of the Board's order, petitioner declared a liquidating dividend, distributed all its assets including the oil refinery where the unfair labor practices occurred, and dissolved.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set out in the Appendix, *infra*, pp. 32–35.

STATEMENT

Upon the usual proceedings, the Board, on August 4, 1938, issued its findings of fact, conclusions of law, and order (R. 1–20). The Board found that in 1937 petitioner, a Texas corpora-

tion engaged at various places in refining crude oil and distributing gasoline and oil (R. 4–5), discharged three employees at its Texas City, Texas, oil refinery because of their membership and activity in Oil Workers International Union, Local No. 227, and that petitioner thereby violated Section 8 (1) and (3) of the Act (R. 9–15, 18).

The Board's order, in usual form, required petitioner, its officers, agents, successors, and assigns to cease and desist from discouraging membership in the Union or any other labor organization of its employees by discharging its employees or otherwise discriminating in regard to hire or tenure of employment, and from interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7. As affirmative action, the order directed that they offer reinstatement to the three employees discriminatorily discharged, pay each of them back pay from the date of his discharge to the date of offer of reinstatement, less his earnings during the period, and post notices at the refinery (R. 19–20).

On June 27, 1939, petitioner entered into a stipulation with a Board representative whereby petitioner agreed that, upon approval by the Board of the stipulation, petitioner, its officers, agents, successors, and assigns would cease and desist as provided in the Board's order, would offer reinstatement without back pay to the three discharged employees within ten days, and would post im-

mediately the notices required by the order (R. 21-23, 37). The stipulation further provided that such action would be considered full compliance with the Board's order, that petitioner, its officers, agents, successors, and assigns would not seek a review of the order, and that the Board would not seek enforcement of it unless petitioner failed to comply with the stipulation (R. 22–23). The stipulation was approved by the Board on July 21, 1939, and took effect on that day (R. 23).

On April 30, 1940, the Board filed in the court below a petition for enforcement of its order alleging, *inter alia,* that notwithstanding its repeated demands that petitioner carry out the terms of the stipulation, petitioner had failed to do so in any respect and had not acknowledged or otherwise replied to the Board's demands.[1] On August 21, 1940, nearly four months after the Board filed its petition, petitioner filed in the court below an application for leave to adduce addi-

[1] The petition for enforcement is set forth at pages 2–7 of the printed "Transcript of Record" in the court below, which has been filed with the Clerk of this Court, and which, by stipulation, constitutes part of the record herein (R. 54–55). Neither in its answer (R. 33–39) to the petition nor otherwise has petitioner denied the allegations as to its failure to comply with the stipulation or to reply to the Board's demands that it do so. The allegations included that on April 17, 1940, the Board notified petitioner by telegraph that the Board would deem the stipulation violated and would institute enforcement proceedings unless promptly advised that petitioner had complied, but that petitioner again failed to reply.

tional evidence before the Board (R. 24–26). The application alleged that on or about June 30, 1939 (which was three days after petitioner had executed the stipulation), petitioner discontinued all operations by declaring a liquidating dividend whereby it distributed all its assets among its four stockholders. The application further alleged that the two stockholders, Cornelius Kroll, petitioner's president and treasurer (R. 26, 38, 39), and G. G. Kroll, who received the Texas City refinery conveyed it to a newly organized Delaware corporation known as Southport Petroleum Company of Delaware, and that the stockholders of the Delaware corporation, which was presently operating the refinery, were at no time stockholders of petitioner. Petitioner prayed that it be permitted to prove these facts before the Board, and that, upon the evidence being made a part of the record, the court dismiss the proceeding (R. 24–26).

The Board filed a memorandum (R. 27–32) opposing the application and asking the court, if it did not thereupon deny the application, to postpone decision upon it until hearing the case on the merits. The memorandum did not admit or deny the events alleged by petitioner, but it pointed out that petitioner still was in existence as a corporation and that there was no allegation that it had been dissolved (R. 31). In addition, the Board called attention to petitioner's delay in seeking to adduce the additional evidence, and to

the indications of bad faith on its part shown by its conduct in entering into the compliance stipulation on the eve of discontinuing operations, and by its conduct thereafter in failing to reply to the Board's demands that it comply with the stipulation (R. 32).[2]

On November 14, 1940, while its application for leave to adduce evidence still was pending, petitioner filed an answer to the Board's petition for enforcement (R. 33–39). The answer alleged that, as evidenced by an attached copy of a certificate of dissolution signed by the Assistant Secretary of State of Texas (R. 39), petitioner formally was dissolved on October 16, 1940 (R. 33). Without waiving its application to adduce evidence, petitioner prayed that the proceeding be dismissed because of the dissolution (R. 33). In its answer petitioner also attacked the Board's findings and order upon evidentiary grounds (R. 34–38).

On January 4, 1941, the court handed down its opinion upholding the Board's order and, in effect, denying petitioner's application to adduce additional evidence and its motion to dismiss (R. 40–45).[3] A rehearing sought by petitioner (R.

[2] Petitioner did not allege and the record nowhere indicates that the alleged liquidation or discontinuance of operations was known to the Board prior to petitioner's filing of its application in the court below.

[3] The court did not expressly deny either the application or motion, but it considered the former in its opinion and

47–52) was denied on February 1, 1941 (R. 52). Thereafter, on February 26, 1941, the court entered its decree enforcing the Board's order (R. 52–54). This Court granted a writ of certiorari limited to the question whether the court below had acted correctly in denying the application to adduce additional evidence (R. 54).

SUMMARY OF ARGUMENT

Section 10 (e) of the Act authorizes either party in a proceeding for enforcement of a Board order to file in the circuit court of appeals an application for leave to adduce additional evidence before the Board. It provides that if the party shows to the satisfaction of the court that the evidence is material and that there were reasonable grounds for not having introduced it at the hearing before the Board, the court "may" grant the application. In the instant circumstances the court below did not abuse its discretion in denying petitioner's application.

A

1. The additional evidence which petitioner sought leave to adduce was to the effect that subsequent to the Board's order petitioner transferred all its assets to its stockholders and ceased doing business. Thereafter, as alleged in its

concluded that the alleged dissolution could have "no effect" upon the proceeding since, under the laws of Texas, petitioner was continued as a corporation for a period of three years for purposes of suing and being sued (R. 44–45).

answer, it was dissolved. In view of the intention of Congress to avoid delays in remedying unfair labor practices and in securing compliance with the Act, leave to prove such subsequent events, not going to the validity of the Board's order but simply to the question of the employer's ability to comply with it, should be granted only upon a clear showing of materiality, especially since inability to carry out the court's enforcement decree would be a complete defense in any contempt proceeding.

2. Petitioner failed to make the required showing. Petitioner was incorporated in Texas and under the laws of that State its corporate existence was continued for a period of three years for the purpose of settlement of its affairs. It could sue and be sued and judgments could be entered against it "as though the same (corporation) were not dissolved." Thus, even apart from the fact that the Board's order was directed against petitioner's officers, agents, successors and assigns, as well as against petitioner, the alleged events could not possibly have abated or rendered the case moot, and hence were not material to petitioner's prayer that upon proof of them the case should be dismissed. The absence of any possible abatement of the back-pay provision is especially clear.

3. Petitioner did not assert or attempt to show that its alleged additional evidence was material to the question whether the Board's order should be modified in any respects prior to enforcement.

Nor does any sufficient showing of such materiality appear from the face of its allegations. This is true as regards each of the provisions of the order. Properly construed, the reinstatement and posting of notice provisions were conditioned upon continued operation of the refinery where the unfair labor practices occurred, and, upon the facts alleged, would not, as petitioner suggests, require it to obtain another refinery or otherwise resume business. Petitioner does not contend that the new corporation alleged to be operating the refinery is not subject to the Board's order, nor would it have standing to do so. For aught that is alleged, the new corporation may well be bound by the order, in which event full enforcement could be in no respect idle.

B

Under Section 10 (e) of the Act the court had discretion to deny petitioner's application even assuming that the evidence sought to be adduced was not wholly immaterial. Accordingly, petitioner's unexplained and protracted course of conduct in not complying with the Board's order or with its stipulation of compliance during the long period prior to its alleged dissolution, and in not seeking to be relieved therefrom or to obtain a modification before the Board, furnishes an additional consideration showing that the court did not abuse its discretion in refusing to permit the further delay in enforcement which would have resulted from granting petitioner's application.

ARGUMENT

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE

The court below held that the evidence as to the illegal discharges found by the Board was adequate to support the Board's findings and order (R. 41, 45). The petition for certiorari, insofar as it sought a review of this holding (Pet. 6, 12–13), was, in effect, denied, since the writ was limited to the question whether the court below properly denied petitioner's application for leave to adduce additional evidence (R. 54). Thus the validity of the Board's findings and order upon the record as made before the Board and certified to the court stands established.

It follows that the decree enforcing the Board's order should be affirmed unless error invalidating it was committed by the court below in denying the application to adduce additional evidence. We shall show that the court had discretion to deny the application and that in the circumstances its action was not an abuse, but was in accordance with the policy of the Act and entirely proper.

Section 10 (e) of the Act, so far as here pertinent, provides:

> * * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is

> material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

Under these express provisions it was incumbent upon petitioner to satisfy the court that the evidence it sought to adduce was material and that there were reasonable grounds for its failure to have introduced it at the hearing before the Board. Even then the use of the word "may" instead of "shall" appears to have left the court with discretion to deny the application.

The court in its opinion indicated that the alleged additional evidence was deemed immaterial since, conceding that petitioner had been dissolved as alleged, its corporate existence under the laws of Texas nevertheless was continued for purposes of suing and being sued (R. 44–45). Whether or not the court's conclusion that the dissolution could have "no effect" upon the proceeding, if taken to mean more than that the case had not abated or become moot, be altogether accurate, need not be decided. For in any event petitioner did not make a sufficient showing to justify the further delay in enforcement of the order which would have resulted from granting its application.

A. THERE WAS NO SUFFICIENT SHOWING THAT THE ALLEGED ADDITIONAL EVIDENCE WAS MATERIAL

1. The Act requires a clear showing of materiality to prove facts occurring subsequent to the Board's order relating to matters of compliance

By its application (R. 24–26) petitioner sought leave to prove, in substance, that some 11 months subsequent to the issuance of the Board's order and some 3 days subsequent to entering into the stipulation that petitioner, its officers, agents, successors, and assigns would comply with the order, except the back pay provision (R. 21–23), petitioner distributed all of its assets among its four stockholders; that Cornelius Kroll, petitioner's president and treasurer (R. 26, 38, 39), and G. G. Kroll were the stockholders who received the Texas City refinery where the three men illegally discharged had been employed; that they in turn transferred the refinery to a newly organized Delaware corporation called Southport Petroleum Company of Delaware, none of whose stockholders had owned stock in petitioner; that the latter company was operating the refinery; and that petitioner no longer operated any refinery, engaged in any active business, or owned any assets.

Thus the additional evidence which petitioner desired to introduce was in no way relevant to the question which normally is the sole issue before the reviewing court, namely, whether the Board's order was "lawful when made." See *National Labor Relations Board* v. *Pennsylvania*

Greyhound Lines, Inc., 303 U. S. 261, 271. It related exclusively to events occurring after the Board had made its order and was designed to support the prayer that the case be dismissed because of petitioner's alleged inability to comply with the order (R. 26).

We do not claim that evidence as to events occurring subsequent to a Board order may never be considered "material" within the meaning of Section 10 (e). On the contrary we may assume that there are cases in which such events might render the case moot or affect the propriety of entering an enforcement decree in the terms of the Board's order or any decree at all.[4] But for reasons which we state by way of introduction to our more specific contentions, we think an application to adduce evidence of such events should not be lightly granted prior to the entry of an enforcement decree.

In Section 10 (i) of the Act[5] Congress made

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[4] Cf. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249–250; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 198 (C. C. A. 9); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6); *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 664 (C. C. A. 9); *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. (2d) 473, 478 (C. C. A. 10), modified in other respects, 313 U. S. 212.

[5] Section 10 (i) reads as follows: "Petitions [for enforcement or review] filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed."

plain its intention that enforcement proceedings should be determined expeditiously by the courts. The legislative history further shows that the Act was designed to preclude delays which would defeat the speedy remedying of unfair labor practices found by the Board.[6] Since a contempt proceeding may be brought only for violation of a court's enforcement decree and since it is the sole effective sanction in compelling compliance (Note (1940) 53 Harv. L. Rev. 472, 473), entry of the decree should not be postponed by remands to the Board except in cases where the circumstances reveal a clear necessity for such action.

Especially should this be true in cases like the instant one where the evidence sought to be adduced concerns only the employer's continued ability to comply with the order as properly construed. Such questions ordinarily should be, and are, left

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[6] The Conference Report on the bill which became the Act (H. Rep. 1371, 74th Cong., 1st Sess., p. 5) stated that the purpose of not requiring a showing of disobedience of the Board's order as a condition to an enforcement proceeding under Section 10 (e) was to avoid delays such as had occurred in cases under the Federal Trade Commission Act where some circuit courts of appeals had required a showing of present disobedience of the order before considering the order on the merits and entering an enforcement decree. The Report states (*ibid.*): "The purpose is to provide for more expeditious procedure. Delay in enforcement procedure due to technicalities would be especially harmful under this act. * * * If such [unlawful] practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings."

to adjustment by agreement between the parties or by supplemental proceedings after the validity of the order has been determined and enforcement has been decreed.[7] If employers were entitled to have them resolved in the manner attempted by petitioner, the Act would "not be workable." Compare *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 871 (C. C. A. 2), certiorari denied, 304 U. S. 576; *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 33 (App. D. C.), affirmed, 311 U. S. 72. In many instances proper enforcement might be delayed indefinitely. For it is inevitable that some changes will occur in the operation of a business during the period between issuance of the Board's order and ultimate enforcement by the court and that such changes will often lend themselves to allegations that the employer no longer can comply with the order as written.

The contention that nevertheless an employer should not be subjected to the threat of a contempt proceeding when unable to do what the order requires or when uncertain as to its true scope is, upon examination, more formal than substan-

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[7] See *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. (2d) 417, 421–422 (C. C. A. 2); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. C. A. 9), certiorari denied, 306 U. S. 643; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 194, 196 (C. C. A. 9); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197, 197–198 (C. C. A. 9).

tial. Only the Board could institute a contempt proceeding (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261) and it is not to be supposed that it would do so where through no fault of the employer compliance had become an impossibility. Moreover, if such a proceeding were brought, the employer would have a complete defense.[8]

In a contempt proceeding brought by the Board in another case, the court below upheld the employer's defense that the decree against it was ambiguous and incapable of being obeyed. *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 98 F. (2d) 405 (C. C. A. 5), rehearing denied 99 F. (2d) 56. Other courts have held that extenuating circumstances amounting to less than inability to comply constituted a good defense. *National Labor Relations Board* v. *Federal Bearings Co., Inc.*, 109 F. (2d) 945 (C. C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.*, 97 F. (2d) 195 (C. C. A. 2); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 108 F. (2d) 188 (C. C. A. 9); *National Labor Relations Board*

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[8] See *Oriel* v. *Russell*, 278 U. S. 358, 364, 365–366; *In re Sobol*, 242 Fed. 487, 489 (C. C. A. 2); *In re Byrd Coal Co.*, 83 F. (2d) 256 (C. C. A. 2); *United States* v. *Jaeger*, 117 F. (2d) 483, 488 (C. C. A. 2); Rapalje, *Contempts*, Secs. 129, 137. Many additional cases to the effect that bona fide inability to comply constitutes a good defense are collected in notes in 22 A. L. R. 1256; 31 A. L. R. 649; 40 A. L. R. 546; 76 A. L. R. 390; 120 A. L. R. 703.

v. *Arcade Sunshine Co.*, decided November 10, 1941 (App. D. C.) (not yet reported).

In the light of these considerations, we think it evident that petitioner did not sufficiently show that there was any occasion for its application to be granted. We show first that, judging by any standard, the alleged additional evidence could not have abated or rendered the case moot.

2. Proof of petitioner's alleged discontinuation of business and dissolution would not have abated or rendered the case moot.

In its application petitioner did not contend that the alleged events which it sought to prove were material in the sense that they should result in a modification of particular provisions of the order. It maintained instead that by reason of its discontinuation of business "it would not be practical for the Court to enter any order" against it, and that the entire proceeding should be dismissed "because the respondent (petitioner) cannot reinstate any employees and cannot carry out any other orders of the Board * * *" (R. 25, 26). Thus petitioner's position was, in substance, that the case was moot or had abated because of petitioner's inability to comply with any provision of the Board's order. This likewise appears to have been petitioner's stand in its answer to the petition for enforcement, wherein it alleged that it had been formally dissolved subsequent to the filing of its application

to adduce evidence and moved for a dismissal of the proceeding on that ground (R. 33).

However, under the laws of Texas, where petitioner was incorporated, a corporation upon dissolution is continued in existence for three years for the purpose of enabling its affairs to be settled. Vernon's Annotated Texas Statutes (Civil Statutes), Vol. 3, Art. 1389 (Appendix, *infra*, p. 35). Unless a receiver is appointed, the president and directors or managers of the corporation at the time of its dissolution are declared to be trustees of the creditors and stockholders, and are empowered, *inter alia*, to distribute the assets "after paying the debts due and owing by such corporation at the time of its dissolution" and to "maintain or defend judicial proceedings" in the name of the corporation. *Id.*, Art. 1388 (Appendix, *infra*, pp. 34–35). In addition, it is specified that the dissolution shall not abate any pending suit against the corporation, but that "such suit shall continue against such corporation and judgment shall be rendered as though the same were not dissolved." *Id.*, Art. 1390 (Appendix, *infra*, p. 35).

These provisions foreclose any contention that the additional evidence which petitioner sought to adduce was material to the object for which it was offered, namely, the securing of a dismissal. This is particularly evident in view of the fact that the Board's order (R. 19–20) was directed not only to

petitioner but to its "officers, agents, successors, and assigns" (see *infra*, pp. 21–23, 25–27), and included a provision requiring the payment of back wages to the three employees unlawfully discharged. As regards the back-pay provision, the alleged dissolution was as clearly ineffectual to avoid enforcement as it would have been to avoid judgments in suits by creditors for the collection of outstanding debts.[9] The decisions holding dissolved Texas corporations liable in such suits are numerous.[10] If, as alleged, petitioner was without assets, having distributed them among its stockholders, collection could be had against the latter or their transferees-with-notice to the extent of the assets received. *National Bank of Jefferson* v. *Texas Investment Co.*, 74 Tex. 421, 436–438;

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[9] Cf. *National Labor Relations Board* v. *Killoren*, 122 F. (2d) 609 (C. C. A. 8), pending on petition for certiorari, No. 739, this Term, in which the court held that upon the adjudication of the employer as a bankrupt, a back pay award made under the National Labor Relations Act was provable against the estate in bankruptcy. The court said: "The mere fact that an employer may cease to do business certainly does not end the public interest involved in seeing that a back pay award under the Act is satisfied" (p. 612).

[10] E. g. *Pease* v. *Rathbun-Jones Eng. Co.*, 243 U. S. 273 (dissolution of Texas corporation pending appeal); *Lyon-Gray Lumber Co.* v. *Gibralter Life Ins. Co.*, 269 S. W. 80 (Tex. Sup. Ct.); *Butcher* v. *J. I. Case Threshing Machine Co.*, 207 S. W. 980 (Tex. Civ. App.); *Becker* v. *Cooper* 22 S. W. (2d) 1083 (Tex. Civ. App.). Cf. *Ewen* v. *American Fidelity Co.*, 261 U. S. 322; *Clark* v. *Williard*, 292 U. S. 112; *Burkburnett Refining Co.* v. *Ilseng*, 116 Tex. 366.

Panhandle National Bank v. *Emery*, 78 Tex. 498, 505; *Pourifoy* v. *Wiebusch*, 132 Tex. 36, 41–42; *Clevenger* v. *Galloway & Garrison*, 104 S. W. 914, 916 (Tex. Civ App.), writ of error denied by Tex. Sup. Ct. (*ibid.*). Cf. *Phillips* v. *Commissioner*, 283 U. S. 589, 592, 603; *Pierce* v. *United States*, 255 U. S. 398.

3. There was no sufficient showing that the alleged additional evidence was material to the propriety of enforcing the Board's order without modification

Since the alleged additional evidence would not have established that the case should be dismissed, it was material, if at all, only to the question whether any of the particular provisions of the order should be modified or deleted prior to enforcement. However, petitioner in its application did not attempt to show the court the respects in which the evidence might be material in that sense; it did not urge any modification of the order. Moreover, no sufficient showing of materiality appeared from the face of the allegations. We will demonstrate this in relation to each of the provisions of the Board's order.

Cease and desist provisions (R. 19): Paragraph 1 of the Board's order directed petitioner, its officers, agents, successors, and assigns to cease and desist from discrimination in regard to hire or tenure of employment, and from interference with exercise of the rights guaranteed to em-

ployees in Section 7 of the Act. Petitioner's alleged discontinuation of business and dissolution did not render enforcement of these provisions unnecessary or improper.

It may be, and there is no allegation to the contrary, that employees were retained or hired or at least might be hired by the liquidating trustees in settling the affairs of petitioner pursuant to the Texas laws already cited (*supra*, p. 18). If so, they were entitled to be protected against a recurrence of petitioner's unfair labor practices, however unlikely such a recurrence may have seemed and whether or not the practices had been discontinued. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 270. On the other hand, if petitioner had no employees and would have none in the future, it could not violate the cease and desist provisions and could not be aggrieved by enforcement.

Furthermore, petitioner made no allegations concerning the propriety of enforcement as against its officers, agents, successors, and assigns. Nor would it have standing to complain of the order or its enforcement as against them. Cf.

Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515, 558; *National Labor Relations Board* v. *Blackstone Manufacturing Co.*, decided November 17, 1941 (C. C. A. 2) (not yet reported). Moreover, enforcement against them was proper. The "officers, agents, successors, and assigns" provision is customary in Board orders [11] and, as is true of similar provisions in equity decrees, it is valid, notwithstanding that the persons or firms who may be covered by it are unknown or nonexistent at the time of issuance. Cf. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 119–120; *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 650–651 (App. D. C.); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6); cf. *National Labor Relations Board* v. *Blackstone Manufacturing Co.*, *supra*.

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[11] This Court has repeatedly enforced Board orders containing the provision, *e.g.*, *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, enforcing 7 N. L. R. B. 237, 252; *National Labor Relations Board* v. *Falk Corporation*, 308 U. S. 453, enforcing 6 N. L. R. B. 654, 666; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, enforcing 8 N. L. R. B. 866, 877; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, enforcing as modified 4 N. L. R. B. 71, 108; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, enforcing 12 N. L. R. B. 854, 883; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, enforcing as modified and remanding 19 N. L. R. B. 547, 603.

In cases arising under the antitrust laws and other statutes which protect public rights, as does the National Labor Relations Act (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265–268; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362–363), the lower federal courts have often held that dissolution of a defendant corporation or association during the pendency of the action does not bar the entry of an injunction against its officers, agents, successors, or assigns, or, in some instances, against it.[11] Compare *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 304–305, 307–310; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 552, and cases there cited; *American Tobacco Co.* v. *Federal Trade Commission*, 9 F. (2d) 570, 575–576 (C. C. A. 2), affirmed on other grounds, 274 U. S. 543.

Reinstatement provisions (R. 19): Paragraph 2 (a) of the Board's order directs that offers of

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[11] *Bohlmer* v. *Louisville & N. R. Co.*, 83 Fed. 898, 902–904 (C. C. A. 4), reversed on other grounds, 175 U. S. 648; *Securities and Exchange Commission* v. *Universal Service Assn.*, 106 F. (2d) 232, 235, 239–240 (C. C. A. 7), certiorari denied, 308 U. S. 622; *Interstate Commerce Commission* v. *Western New York & P. R. Co.*, 82 Fed. 192, 194 (C. C. W. D. Pa.); *United States* v. *Bates Valve Bag Corp.*, 39 F. (2d) 162, 164–165 (D. Del.); *Securities and Exchange Commission* v. *Lawson*, 24 F. Supp. 360, 364–365 (D. Md.); *Beaumont S. L. & W. Ry. Co.* v. *United States*, 36 F. (2d) 789, 800 (W. D. Mo.), affirmed 282 U. S. 74.

reinstatement to their former positions be made to the three employees found to have been discharged illegaliy. As is true of the other provisions of the order, there is no question that this provision was valid when made and that petitioner could have complied with it at any time during the period of 11 months intervening the order and the alleged liquidation. Indeed, petitioner stipulated that it would make the offers of reinstatement (R. 22).

In its application to adduce evidence petitioner alleged that by reason of its distribution of assets and discontinuation of business it could not reinstate any employees (R. 26). Thereafter in its petition for rehearing in the court below (R. 49) and petition for certiorari in this Court (Pet. 6, 7, 9–10), petitioner maintained that it could not do so unless, as it suggested, the order required it to purchase and operate another refinery or otherwise resume business. Properly construed (cf. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117–118), the order contains no such requirement. Its purpose was to remedy petitioner's violations of the Act by restoring the status quo as it existed prior to the violations, but only to the extent possible under the circumstances existing at the time of compliance, assuming that the circumstances were not changed through any bad faith on petitioner's part. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 97 F. (2d) 195, 196–197 (C. C. A. 2).

That the men were to be offered reinstatement "to their former positions" (R. 19) is express indication that the reinstatement provision was contingent upon continued operation of the Texas City refinery. This likewise appears to have been true of paragraph 2 (c) of the order requiring the posting of notices "at its Texas City, Texas, refinery" (R. 20).

It follows from the foregoing interpretation that if the application to adduce evidence had been granted and had resulted in exempting petitioner from the reinstatement provision so long as in good faith it could not reinstate the employees, petitioner would be in no better position than it is now. As regards the instant paragraph of the order, therefore, a remand to the Board could have served no purpose other than a possible resolution of the question whether Southport Petroleum Company of Delaware, which was alleged to be operating the refinery (R. 25), was a successor or assign of the petitioner within the meaning of the Board's order and required as such to offer reinstatement to the employees. But that question, while interesting, neither could have been raised by petitioner, nor was it. *Supra*, pp. 21–22.

Moreover, even if petitioner had contended that the order should not be enforced as against its officers, agents, successors, or assigns, and had standing to do so, its allegations would not have warranted a remand. There is no allegation as to

the reason for the transfer of the refinery from petitioner to two of its stockholders and from them to the new corporation. Nor is there any allegation as to whether the new corporation assumed the obligations of petitioner, or took with notice of the outstanding Board order. Thus, for aught that appears, the new corporation may well be obligated to comply with the order, including the affirmative provisions not carried out by petitioner.[13]

It is indeed arguable that even if the new corporation were assumed not to have acquired the refinery for purposes of evading the Board's order, and not to have assumed petitioner's obligations, it should nevertheless be required to reinstate the employees, especially if, as is probable, it had notice of the order. Petitioner's obligation to

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[13] *National Bank of Jefferson* v. *Texas Investment Co.*, 74 Tex. 421, 436 (assignee assuming obligations held liable); *Panhandle National Bank* v. *Emery*, 78 Tex. 498, 505 (*id.*); *National Labor Relations Board* v. *Hopwood Retining Co.*, 98 F. (2d) 97 (C. C. A. 2), on contempt, 104 F. (2d) 302 (successor required to comply when acting as agent in avoidance of Board's order); *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. (2d) 587, 594–595 (C. C. A. 3) (successor required to comply); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6) (*id.*); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574 (C. C. A. 7), certiorari denied, No. 261, this Term (successor receiver held liable for predecessor's unfair labor practices); cf. *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 650–651 (App. D. C.); *Pierce* v. *United States*, 255 U. S. 398. See also the cases cited *supra*, pp. 19–20.

comply with the Board's order and to reinstate the men became fixed when the Board made its order (*National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 541–542 (C. C. A. 9), certiorari denied, 306 U. S. 646), and had petitioner reinstated them when it admittedly could have, they presumably would have remained in their jobs when the refinery was transferred. Their employee status was continued by the Act (Section 2 (3)), and the view is reasonable that since the refinery continued to be operated as a going concern, the illegally discharged men were entitled to their jobs regardless of the alleged change in ownership. As was recognized in *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 182–183 (C. C. A. 6), where a Board order against a partnership was enforced against a surviving partner, both the Act and the Board's orders are designed to regulate not only the entity which committed the unfair labor practices, but what the court termed the "employing industry." A narrower view, which would deny illegally discharged employees the jobs they presumably would have continued to hold had they not exercised the rights guaranteed by the Act, would subvert the legislative policy expressed in Section 1 to protect and foster "the right of employees to organize" and the "practice and procedure of collective bargaining."

Back pay provisions (R. 19–20): The ineffectiveness of petitioner's alleged dissolution to

relieve it of the obligation to reimburse its discharged employees pursuant to paragraph 2 (b) of the Board's order has already been indicated. *Supra*, pp. 19–20.

The additional evidence, if at all material to this paragraph of the order, would have been pertinent only with respect to the date to which the back pay should run.[14] The date specified in the order is the date of the offers of reinstatement (R. 20). If, as alleged, petitioner could not make such offers after its liquidation, the date, as against petitioner, if not its successors, properly would be the last day when it could have made them. Cf. *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 661, 664 (C. C. A. 9). But there was no occasion for granting its application merely to ascertain that date. Questions concerning the amount of back pay due under Board orders arise in almost every case and, at

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[14] Petitioner has hitherto contended (R. 5[1]; Pet. 7, 11–12), citing *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9), certiorari denied, 306 U. S. 646, that since it could not offer reinstatement to its employees, the back pay provision was invalid as beyond the Board's power. However, the Board's power to order back pay without reinstatement was expressly sustained in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 113 F. (2d) 202, 205–206 (C. C. A. 2), and the decision on the point was affirmed by this Court without specific discussion thereof (313 U. S. 177, 200). See page 8 of our brief in opposition to the petition for certiorari herein. See also *National Labor Relations Board* v. *Hearst*, *supra*; *National Labor Relations Board* v. *Killoren*, 122 F. (2d) 609, 613 (C. C. A. 8), pending on petition for certiorari, No. 739, this Term.

least in the first instance, are dealt with more appropriately by adjustment between the parties than they could be through the time-consuming method of formal proceeding. Indeed, except in cases where the offers of reinstatement are made prior to the close of the proceeding, the precise amount of back pay ultimately to be due can never be determined therein.[15]

Posting of notice provision (R. 20): Paragraph 2 (c) of the order, as aforementioned, directed that notices be posted at petitioner's Texas City refinery stating that it would cease and desist in the manner required by paragraph 1. What has been said (*supra*, pp. 23–27) as regards the reinstatement provision is similarly applicable to this, so that we need add nothing further.

B. PETITIONER'S COURSE OF CONDUCT PRIOR TO FILING ITS APPLICATION ADDITIONALLY JUSTIFIES THE COURT'S EXERCISE OF DISCRETION IN DENYING THE APPLICATION

The considerations which we have set out in Point A are alone sufficient, we think, to establish

[15] The cases hold that the failure of the order to set forth the amount of back pay due does not bar enforcement. *National Labor Relations Board* v. *Fashion Piece Dye Works*, 100 F. (2d) 304, 305–506 (C. C. A. 3); *Mooresville Cotton Mills* v. *National Labor Relations Board*, 97 F. (2d) 959, 963 (C. C. A. 4); *Mexia Textile Mills* v. *National Labor Relations Board*, 110 F. (2d) 565 (C. C. A. 5) (*sub silentio*); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 539, 542–543 (C. C. A. 9), certiorari denied, 306 U. S. 646.

that the court did not err in denying petitioner's application. There is, however, an additional consideration supporting the court's action.

Under Section 10 (e) the court had discretion to deny the application even if the additional evidence sought to be adduced was not wholly immaterial. *Supra*, pp. 10–11. A factor which seems pertinent to the question whether, assuming that view of the evidence, the court abused its discretion, is afforded by petitioner's unexplained and protracted course of conduct prior to the filing of its application. In the circumstances, this was such, we believe, as should preclude any holding that petitioner was entitled to the further delay in enforcement which would have resulted if the court had exercised its discretion differently.

In the first place, petitioner had ample time to comply with the Board's order during the period of eleven months intervening issuance of the order and petitioner's alleged liquidation. Yet without any meritorious excuse, it failed to do so. Nor did it file a petition for a review of the order as permitted by Section 10 (f). Moreover, although the liquidation was alleged to have occurred some ten months prior to the Board's filing of its petition for enforcement (R. 24–26), petitioner assigned no reasons for its failure to further prompt disposition of the cause by applying to the Board during that period to reopen the proceeding for proof of the alleged events or to be relieved from comply-

ing with the order or the stipulation for compliance. Finally, petitioner at no time explained its conduct in entering into the stipulation on the eve of its alleged liquidation and in not even replying thereafter to the Board's communications attempting to secure compliance.

Having avoided compliance with the Board's order in the manner thus summarized, petitioner is not in a position now to complain that the court abused its discretion.

CONCLUSION

For the foregoing reasons we respectfully submit that the court below did not abuse its discretion, and that petitioner's application to adduce additional evidence was properly denied. The decision below should be affirmed.

Respectfully submitted,

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DECEMBER 1941.

APPENDIX

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*):

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the

employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

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SEC. 10. * * *.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals * * * for the enforcement of such order * * * and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court * * * shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the

transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

* * * * *

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

Vernon's Annotated Texas Statutes (Civil Statutes) Vol. 3:

Art. 1388. Liquidation by officers.—Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority of said company over such assets and property. Said trustees shall be severally responsible to the creditors and stockholders

of such corporation to the extent of its property and effects that shall have come into their hands.

Art. 1389. Extension of existence.—The existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of enabling those charged with the duty, to settle up its affairs. In case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle the affairs of such corporation.

Art. 1390. Effect of dissolution.—The dissolution of a corporation shall not operate to abate, nor be construed as abating any pending suit in which such corporation is a defendant, but such suit shall continue against such corporation and judgment shall be rendered as though the same were not dissolved.

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 67.

SOUTHPORT PETROLEUM COMPANY,
PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR REHEARING.

HARRY DOW,
Houston, Texas,
Attorney for Petitioner.

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Supreme Court of the United States

No. 67.

SOUTHPORT PETROLEUM COMPANY,
PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR REHEARING.

To the Honorable Supreme Court of the United States:

Now comes the Southport Petroleum Company, petitioner herein, and respectfully presents its Petition for Rehearing, and, in support thereof, lists the following grounds:

First Ground.

This Honorable Court erred in failing to resolve the conflict existing in the decision of the Circuit Court of Appeals for the Fifth Circuit, in this case, 117 F. 2d 90 (C. C. A. 5), and the decision of the Circuit Court of Appeals for the Second Circuit, in the case of *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F 2d 449 (C. C. A. 2).

In each case, a corporation was dissolved after the Board issued its order against such corporation.

In each case, the Statutes of the respective States wherein the corporations operated, provided that the corporation should be presumed to continue to exist for three years after the dissolution.

The Fifth Circuit Court held that, "conceding that the dissolution has taken place, it can have no effect upon this proceeding"; whereas, the Second Circuit Court held, under similar state of facts, that, "an order which required for its compliance the continuation of such respondent's business, as, for instance, the reemployment of unlawfully discharged employees, might well be beyond the power of the Board * * *."

Second Ground.

The decision of this Honorable Court is in conflict with the holding of this Honorable Court in the case of *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364, wherein this Court held:

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

Third Ground.

This Honorable Court erred in failing to hold that, under the Texas Statutes dealing with the dissolution of a corporation, the only kind of judgment which may be rendered against a dissolved corporation is a money judgment, to which the assets of the corporation may be subjected.

This Honorable Court cited Articles 1388, 1389 and 1390, but failed to cite Article 1391,* which should be

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*Article 1391. "Suit on claim.—When no receiver has been appointed for said corporation, suit may be instituted on any claim against said corporation, as though the same had been dissolved, and service of process may be obtained on the president, directors, general manager, trustee, assignee, or other person in charge of the affairs of the corporation at the time it was dissolved, and judgment may be rendered as though the corporation had not been dissolved, *and the assets of said corporation shall be liable for the payment of such judgment* just as if said corporation had not been dissolved" (italics supplied).

read and construed with the aforementioned articles, and which Article 1391 provides that the judgment rendered against a dissolved corporation shall be such a judgment for which "the assets of said corporation shall be liable."

The Texas Statutes do not authorize a judgment against a dissolved corporation which would require such corporation to resume operations.

Fourth Ground.

This Honorable Court erred in basing its majority opinion on such suspicions reflected by the statement that the allegation in the affidavit of the Southport Petroleum Company, "does not negative either the possibility that the stock in the Delaware corporation represents but an insubstantial part of its total capitalization, with the balance and real control being held by the Texas corporation, or its Stockholders, or that its stock was held by straw men," because there is nothing in the record to justify such suspicion, and this Honorable Court should not indulge in such possibilities; particularly, since the petitioner, by its verified motion, was begging the Court to remand the case to the Board where a complete hearing could be held before an Examiner appointed by the Board, where both the petitioner and the Board could adduce evidence on the *bona fides* of the dissolution.

Fifth Ground.

This Honorable Court erred in holding, "the record makes it certain that it (referring to Petitioner), would gain delay by all honest means and leaves it doubtful whether it has ever stopped at that," because a careful examination of the record will reflect that the delay was due to the conduct of the Board by reason of the following:

(a) The Board's order dated August 4, 1938 (Tr. of Rec. p. 84), required the Regional Director to hold an elec-

tion within 15 days from its date. The election was indefinitely postponed.

(b) The Board waited ten months to procure a stipulation from the Petitioner. Since the Petitioner dissolved three days after the stipulation, the Petitioner could not carry out that part of the stipulation requiring reinstatement of three employees. The stipulation relieved the Petitioner of the obligation to make whole the discharged employees.

(c) The Board waited twenty months after the date of its order, before filing its petition in the Circuit Court to enforce its order.

This Petitioner, therefore, submits that the action of the Board lulled the respondent into a feeling of complacency; and that the delay may be blamed on the Board, for it could have filed its petition for enforcement, thirty days after the Board entered the order, whereas, it waited twenty months. It follows that the inference contained in the above quotation, made by this Honorable Court against the petitioner, does petitioner a grave injustice.

Sixth Ground.

This Honorable Court erred in not remanding the case to the Board, but, nevertheless, holding that the question of whether there was a *bona fide* dissolution and a true change of ownership was a question of fact to be resolved by the Board "on direct resort to it," because, after the petition was filed in the Circuit Court, the only action which the petitioner could take, according to the terms of the National Labor Relations Act, was to file the motion and affidavit which it filed, as required by Section 10 (e) of the Act. The Court had acquired jurisdiction, and the petitioner properly addressed its request to the Court to remand the case to the Board to make this proof.

Seventh Ground.

In view of the Board's position in this case, this Honorable Court erred in not modifying and affirming the judgment of the Circuit Court of Appeals, by eliminating 2 (a) and 2 (c) from the Board's order, said provisions requiring an affirmative compliance of reinstating and the posting of notices, and by not limiting the make whole order to June 30, 1939, the date of the discontinuance of operations by the petitioner.

STATEMENTS, ARGUMENTS AND AUTHORITIES IN SUPPORT OF THE ABOVE GROUNDS.

Statement, Argument and Authorities under First, Second and Third Grounds.

By its verified motion, the petitioner alleged that it, in good faith, discontinued operations on June 30, 1939, and duly dissolved its corporation. This took place after the date of the Board's order and, therefore, it could not have been presented as evidence before the Board. If the dissolution was in good faith, the petitioner contends that it could not reinstate employees, for it had no plant wherein to reinstate employees.

The decision in the case of *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F. 2d 449 (C. C. A. 2), points out that the Board has no authority to require reinstatement of employees where the corporation has dissolved. In that case, as in the case at bar, the corporation was dissolved after the Board entered its order. In that case, the Circuit Court of Appeals properly remanded the case to the Board.

The Texas Statutes, Articles 1388, 1389, 1390 and 1391, do not authorize a judgment which would require a dissolved corporation to continue operations. The only kind of judgment which can be entered against a dissolved

corporation is a money judgment. The Honorable Circuit Court of Appeals for the Fifth Circuit, in support of its decision that the dissolution of the Texas corporation could have "no effect upon this proceeding," cited the cases of:

Chevrolet Motor Co. of Texas v. *Morris Auto Co.*, (Tex. Civ. App.) 269 S. W. 872; and

Eastman Gardiner & Co. v. *Warren*, (5th Circuit) 109 F. 2d 193.

The first case was a suit on a contract, whereby plaintiff sought to procure a money judgment against a dissolved corporation, and the second case was a tort action for damages against a dissolved corporation. In both cases, only money judgments were sought and, therefore, are not pertinent to the issues in this case.

The matter of remanding causes for further proceedings is rather common, as was pointed out by Chief Justice Hughes, in the case of *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364.

A remand was made by this Honorable Court in the case of *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, and in the case of *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241.

Both in the Ford case and in the Newport News case, the remand was granted at the request of the Board.

A remand to the Board is the only procedure provided by the terms of the National Labor Relations Act, Section 10 (e), whereby additional evidence may be made a part of the record and form the basis of a proper judicial determination.

The evidence was certainly material, for no Court would enter an order requiring reinstatement and posting of notices against a corporation which operated no plant and could, therefore, not reemploy or post notices. Even the Board conceded this proposition; for it concedes in its

Brief (page 24) that the order does not require the petitioner to repurchase an oil refinery and resume operations.

Statement, Argument and Authorities under Fourth, Fifth, Sixth and Seventh Grounds.

Even a casual reading of the majority opinion of this Honorable Court will reflect that it is not based on what is in the record, but possibilities which may be suspicioned outside of the record.

The position of the petitioner should negative the suspicion of such possibilities, for, if the petitioner were guilty of creating a "sham dissolution," it stands to reason that petitioner would not file its motion for the purpose of adducing evidence, which would prove an improper dissolution. Furthermore, if the Board were of the opinion that the dissolution was not in good faith, it would have joined in the motion to remand the case to the Board and made the Delaware corporation a party to the proceedings, as was done in the case of *National Labor Relations Board* v. *Hopwood Retinning Corp.*, 98 F. 2d 97; 104 F. 2d 302 (C. C. A. 2). In that case the Hopwood Corporation conveyed all of its assets to the Monarch corporation for the purpose of evading a Board order, and the Board, by proper proceedings, brought both corporations before it and had the order entered against both corporations.

Likewise, in the case of *Bethlehem Steel Co. et al.* v. *National Labor Relations Board*, 120 F. 2d 641 (App. D. C.), both the parent corporation and the dominated subsidiary corporation were properly made parties to the proceedings, and required to obey an order of the Board.

On the other hand, in the companion cases of *Press Co., Inc.*, v. *National Labor Relations Board* and *Gannett Co.* v. *National Labor Relations Board*, 118 F. 2d 937 (l. c. 947) (C. App. D. C.), wherein the facts developed that

one corporation was not guilty of violating the National Labor Relations Act, the order was properly enforced against the other corporation guilty of unfair labor practices.

If the petitioner's motion were granted and the case remanded to the Board and both the Texas and the Delaware corporations made parties to the proceeding, both corporations and the Board would, in the proper forum, have an opportunity to present evidence, and on such evidence a definite order could be entered.

Petitioner knows that such evidence would definitely establish that the liquidating dividend was declared in good faith; that the dissolution was in good faith, and that the Delaware corporation was not an *alter ego* or agency or dominated subsidiary of the Texas corporation, but was a separate, independent entity, and the only reason for retaining the name "Southport" was because the Texas corporation had marketed gasoline under such trade-name, and the new Delaware corporation continued marketing the same product under the same trade-name.

The evidence would also establish all of the facts alleged in petitioner's motion to remand the case to the Board to adduce additional evidence.

The petitioner is not seeking this for the purpose of delay, for there is no advantage to be gained by petitioner by delay. As pointed out in the Fifth Ground, *supra*, the delay in this case cannot be entirely blamed on the petitioner.

Since this Honorable Court held that any question of the *bona fides* of the dissolution should be resolved by the Board on "direct resort of it," and since, if the Board entertained any doubt about the *bona fides* of the dissolution, it would have joined in the motion to remand and made the Delaware corporation a party to the proceeding, but did not take this action; but, on the contrary, contested the remanding of the case, it follows, inevitably, that this Honorable Court should enter its judgment

modifying and affirming the judgment of the Circuit Court of Appeals and the order of the Board, such modification to consist of the elimination of the affirmative requirements reflected in Sections 2 (a) and 2 (c) of the Board's order requiring reinstatement and posting of notices and by limiting the make whole order to June 30, 1939.

The Board did not controvert the statements in the affidavit of the petitioner, and the Board contested the application to remand, thereby, apparently, taking the position that it did not question the *bona fides* of the dissolution.

This petitioner respectfully submits that the majority opinion is based on possibilities outside of the record and at the same time is denying the petitioner the right to disprove such possibilities; that a proper judgment would be granted by applying the terms of the law to the facts in the record, rather than the policy of the law to the possibilities outside of the record; that, in order to base judgment on the record, this Honorable Court should eliminate those portions of the order with which this petitioner cannot comply. To do otherwise, would be judicially extending the policy of the law far beyond what is warranted by the facts in the record and the terms of the act.

Prayer.

Wherefore this petitioner earnestly and sincerely prays that this Honorable Court grant this motion for rehearing, withdraw its majority opinion and enter its order remanding this case to the Board or modifying and affirming the order of the Board as set out in the Seventh

Ground hereof; and for such other orders herein, as may be proper.

Respectfully submitted,

HARRY DOW,
306 First National Bank Bldg.,
Houston, Texas,
Attorney for Petitioner.

Certificate of Counsel.

I, Harry Dow, hereby certify that I am the attorney and counsel for Southport Petroleum Company, the petitioner in the above-entitled proceeding, and that the foregoing motion for rehearing is not presented for purposes of delay, but is, in my opinion, well founded in law and fact and proper to be filed herein.

Attorney for Southport Petroleum Company, Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 67.—October Term, 1941.

Southport Petroleum Company, Petitioner, *vs.* National Labor Relations Board.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 19, 1942.]

Mr. Justice Jackson delivered the opinion of the Court.

The petitioner, a Texas corporation, was ordered by the National Labor Relations Board in August of 1938 to cease and desist from unfair labor practices;[1] to offer to reinstate three employees found to have been discriminatorily discharged, and to pay them back pay for the period from the time of discharge to the date of the offer of reinstatement, less earnings during such period; and to post certain notices at its Texas City refinery, where the unfair labor practices had been employed.

The petitioner has never obeyed any of the affirmative directions of the order. In June of 1939 it entered into a written stipulation with the Board that it would obey the order except as it related to back pay, and the Board stipulated on its part that it would accept the performance so promised as sufficient compliance with its order. But the petitioner no more regarded its own promise than it had the Board's command. It finally ceased even to answer communications from the Board, and the latter in April of 1940 filed its petition with the Circuit Court of Appeals for the Fifth Circuit for enforcement of its order.

The petitioner then began the pleas to that court, denial of which it says are errors. Nearly four months after the Board had filed its

[1] Section 1 of the Board's order required that the petitioner cease and desist from:

"(a) Discouraging membership in Oil Workers International Union, Local No. 227, or in any other labor organization of its employees, by discharging its employees or by otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of

petition, the present petitioner filed an application under § 10(e) of the National Labor Relations Act[2] to adduce additional evidence before the Board. The application stated on the oath of petitioner's president that in June of 1939, three days after petitioner had executed the stipulation of obedience to the Board's order, it distributed all of its assets to its four stockholders as a liquidating dividend, and that the two stockholders who received the Texas City refinery conveyed it to a newly organized Delaware corporation whose stockholders were at no time stockholders of the Texas corporation. It asked that the court order that proof of these facts be taken before the Board or its agent and added to the transcript, and that the court thereupon dismiss the enforcement proceeding. In November of 1940, while this application was pending, it filed an answer to the petition for enforcement, attacking the findings and order of the Board on evidentiary grounds, and also praying that the petition be dismissed because petitioner had been formally dissolved on October 16, 1940, as evidenced by an attached copy of a certificate by the Texas Assistant Secretary of State.[3]

The Circuit Court of Appeals sustained the Board's order and entered a decree directing that it be enforced, thus in effect denying the motion to dismiss and the application for leave to adduce additional evidence. 117 F. 2d 90. We granted certiorari limited

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collective bargaining or other mutual aid or protection, as guaranteed by section 7 of the Act."

We do not consider the question whether, in the rather unusual circumstances of this case, the order should be modified as being unduly broad in this respect, see National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, since this question was not considered or raised in the court below or in the petition for certiorari. Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 242; Gunning v. Cooley, 281 U. S. 90, 98; Zellerbach Paper Co. v. Helvering, 293 U. S. 172, 182.

[2] This provides in pertinent part as follows: "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript." 49 Stat. 449, 454; 29 U. S. C. (Supp. V) § 160(e).

[3] Texas provides by statute that:

"*Art. 1388. Liquidation by officers.*—Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders and

to the question of the propriety of the denial of the latter because of the general importance of the question. — U. S. —.

We hold that the application for leave to adduce additional evidence pursuant to § 10(e) of the National Labor Relations Act was addressed to the sound judicial discretion of the court and that the denial of petitioner's application under the circumstances disclosed by the record in this case was not error.

To ensure that the applicable part of § 10(e) would be used only for proper purposes, and not abused by resort to it as a mere instrument of delay, Congress provided that before the court might grant relief thereunder it must be satisfied of the materiality of the additional evidence, and that there were reasonable grounds for failure to adduce it at the hearing before the Board. The decision below under § 10(e) apparently resulted solely from a belief that the proffered evidence was not "material." Accordingly, we have no occasion to decide whether a Circuit Court of Appeals may in its discretion deny an application under § 10(e) even though it be satisfied that the additional evidence is material and that there were reasonable grounds for failure to adduce it in the hearing before the Board. For the same reason we do not consider the question of the credibility of petitioner's allegations, viewed in the light of its conduct.

The petitioner's conduct does, however, give point to omissions of pertinent facts from its allegations. The record makes it certain that it would gain delay by all honorable means and leaves it doubtful whether it has even stopped at that. The liquidation

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paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority of said company over such assets and property. Said trustees shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands.

"*Art. 1389. Extension of existence.*—The existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of enabling those charged with the duty, to settle up its affairs. In case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle the affairs of such corporation.

"*Art. 1390. Effect of dissolution.*—The dissolution of a corporation shall not operate to abate, nor be construed as abating any pending suit in which such corporation is a defendant, but such suit shall continue against such corporation and judgment shall be rendered as though the same were not dissolved." 3 Vernon's Annotated Texas Statutes (Civil Statutes).

relied upon took place three days after it had entered into the stipulation of obedience. The purpose to liquidate was not communicated to the Board, nor was the Board advised of the action when taken, nor until nearly four months after the petition for enforcement was filed in the Circuit Court of Appeals.

The statements that the Texas corporation has discontinued operations and that the Delaware corporation has taken over the refinery did not call for recommitment by the Circuit Court of Appeals to the Board for reconsideration of that part of its order which required that the three employees be offered reinstatement. The allegation in the application that the "owners of the stock of Southport Petroleum Company of Delaware, were never the owners of any of the stock of the respondent herein," does not negative either the possibility that the stock in the Delaware corporation represents but an insubstantial part of its total capitalization, with the balance and real control being held by the Texas corporation or it stockholders, or that its stock was held by straw men. A sworn statement in the answer to the Board's petition that the Delaware corporation "is a separate and distinct entity and the stockholders in respondent have no interest, and never had any interest, directly or indirectly, in the stock ownership of the said Delaware corporation, all as set out in respondent's motion heretofore filed herein," if it adds anything, does not add enough to negative these possibilities, for the court was not required to be satisfied with such conclusions of the petitioner.

Implicit in the reinstatement provision of the Board's order was a condition of the continued operation by the offending employer of the refinery to the employment of which the illegally discharged employees were to be restored.[4] Such operation might have continued under the old business form or under a disguise intended to evade this provision. If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief from the Board's order of reinstatement; instead there is added ground for compelling obedience. Whether there was a *bona fide* discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear, and accordingly is a question of fact properly to be

[4] The order required that the employees be reinstated "to their former positions, without prejudice to their seniority and other rights and privileges."

resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted.[5]

The additional evidence was immaterial for the further reason that the Board's order ran not only to the petitioner, but also to its "officers, agents, successors, and assigns."[6] Granting the truth of every one of petitioner's allegations, it still is possible that the Board's order may yet be the basis—and the indispensable basis—of liability on the part of any of these persons regardless of any present incapacity of petitioner to perform, or liability on its part for failure to perform, its duty of reinstatement. Of course we do not pass on the question whether any such liability actually exists; all we hold is that there has not been a sufficient showing by the petitioner to negative the possibility which we note.

The petitioner's allegations are immaterial with respect to the back pay provision in the Board's order for like reasons and because some liability in this respect unquestionably exists, although for a disputed period of time. And from what we have said it is apparent that the petitioner has not shown that there has been any change in its relations to the refinery such as to indicate any alteration of the Board's order in respect of its requirements that petitioner post notices at "its Texas City, Texas, refinery", and that it desist from unfair labor practices.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

Mr. Justice REED, dissenting.

The record does not lead me to the conclusion that petitioner has taken any improper steps to secure leave to adduce additional evidence, the matter to which the certiorari was limited by our

[5] Such proceedings may be instituted only by the Board. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261.

[6] This is the usual form of order, and has frequently been employed in cases where this Court has sustained Board orders. *E. g.*, Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, enforcing, as modified, 4 N. L. R. B. 71, 108; National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241, enforcing 8 N. L. R. B. 866, 877; National Labor Relations Board v. Falk Corporation, 308 U. S. 453, enforcing 6 N. L. R. B. 654, 666; National Labor Relations Board v. Waterman Steamship Corp., 309 U. S. 206, enforcing 7 N. L. R. B. 237, 252; National Labor Relations Board v. Link-Belt Co., 311 U. S. 584, enforcing 12 N. L. R. B. 854, 883; Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, enforcing, as modified, and remanding 19 N. L. R. B. 547, 603.

grant. It is plain that the Circuit Court of Appeals did not act on any such ground. Neither the record on that issue nor the Government's brief or argument make any such contention. Only after evidence before the Board would it seem proper for a court to form its opinion of that question.

So far as we now know the petitioner sold its facilities in good faith, after the entry of the Board's order and prior to its motion to remand, thus divesting itself of all interest or control over its former properties. In that situation it asked a remand to the Board to present before the Board the change of conditions because of which it asked a dismissal of the proceedings. § 10(e), 49 Stat. 453. There were two literally unconditional provisions of the order which petitioner, if its allegations are true, could not meet. 2(a) and (c):

"2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to William Cornish, E. D. Richey, and Earl Gooch immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges;

. . . . . .

(c) Post immediately notices in conspicuous places at its Texas City, Texas, refinery stating that the respondent will cease and desist in the manner aforesaid, and maintain said notices for a period of thirty (30) consecutive days from the date of posting."

In its brief respondent, it seems to me, admits the correctness of petitioner's view. It says:

"In its application to adduce evidence petitioner alleged that by reason of its distribution of assets and discontinuation of business it could not reinstate any employees. Thereafter in its petition for rehearing in the court below and petition for certiorari in this Court petitioner maintained that it could not do so unless, as it suggested, the order required it to purchase and operate another refinery or otherwise resume business. Properly construed (cf. *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 117-118) the order contains no such requirement. Its purpose was to remedy petitioner's violations of the Act by restoring the status quo as it existed prior to the violations, but only to the extent possible under the circumstances existing at the time of compliance, assuming that the circumstances were not changed through any bad faith on petitioner's part. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 97 F. 2d 195, 196-197 (C. C. A. 2). That the men were to be offered reinstatement 'to their former positions' is express indication that the reinstatement provision was contingent upon continued operation of the Texas City refinery. This likewise appears

to have been true of paragraph 2(c) of the order requiring the posting of notices 'at its Texas City, Texas, refinery.' "

We cannot treat this suggestion as relieving this petitioner of the threat of contempt proceedings. The statement does not consent to the amendment of the order. Bad faith may still be claimed to exist. This should be determined by the Board. Consequently, I am of the opinion that the decree below should be reversed with directions to sustain the motion for a remand unless the Board agrees to eliminate sections 2(a) and (c) of the order in line with the Board's apparent concession in its brief.

The CHIEF JUSTICE concurs in this dissent.